PETITION NOT PRINTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 70

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 28, 1959
CERTIORARI GRANTED APRIL 18, 1960

Supreme Court of the United States

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THEODORE GREEN, PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

At a District Court of the United States of America, for the District of Massachusetts, begun and holden at Boston, within and for said District, on the third Monday of September in the year of our Lord one thousand nine hundred and fifty-two.

INDICTMENT—Returned September 29, 1952

COUNT ONE:

The Grand Jury for the United States of America, within and for the District of Massachusetts, upon its oath, charges that

THEODORE GREEN, alias
Theodore Georgacopolos,

of Boston,

DAVID S. JACOBANIS, alias
Jack Nelson and John Nelson,

of Needham,

MARCO ANTONIO ROCCAFORTE, alias
Anthony Rockford,

of Boston,

all in the District of Massachusetts, on or about September 13, 1951, at Norwood, in the District of Massachusetts, did enter a bank, the deposits of which were insured by the Federal Deposit Insurance Corporation, to wit, the Norwood Bank and Banking Company, with intent to commit in said Bank a Felony affecting said bank and in violation of Title 18, Section 2113(a) of the United States Code, to wit, for the purpose of robbing said bank; in violation of Title 18, Section 2113(a) of the United States Code.

COUNT TWO:

The Grand Jury further charges that

THEODORE GREEN, alias
Theodore Georgacopolos,

of Boston,

DAVID S. JACOBANIS, alias
Jack Nelson and John Nelson,

of Needham,

MARCO ANTONIO ROCCAFORTE, alias
Anthony Rockford,

of Boston,

all in the District of Massachusetts, on or about Septem- [fol. 2] ber 13, 1951, at Norwood, in the District of Massachusetts, did, by force and violence and by intimidation, take from the presence of others certain property and money and other things of value belonging to, and in the care, custody, control, management, and possession of a bank; to wit, certain property and money and other things of value belonging to and in the care, custody, control, management, and possession of the Norwood Bank and Banking Company, the deposits of which company were insured by the Federal Deposit Insurance Company; in violation of Title 18, Section 2113(a) of the United States Code.

COUNT THREE:

The Grand Jury further charges that

THEODORE GREEN, alias
Theodore Georgacopolos,

of Boston,

DAVID S. JACOBANI, alias
Jack Nelson and John Nelson,

of Needham,

MARCO ANTONIO ROCCAFORTE, alias
Anthony Rockford,

of Boston,

all in the District of Massachusetts, on or about September 13, 1951, at Norwood, in the District of Massachusetts, did, in committing the offense of robbery of a bank,

as defined in Title 18, Section 2113(a) of the United States Code, to wit, robbery in the Norwood Bank and Banking Company, the deposits of which company were insured by the Federal Deposit Insurance Corporation, assault certain persons and put in jeopardy the lives of certain persons in said bank by the use of a dangerous weapon and device; all in violation of title 18, Section 2113(d) of the United States Code.

[fol. 3] A TRUE BILL.

s/ Elliot C. Laidlaw
Foreman of the Grand Jury.

s/ Edward D. Hassan
Asst. United States Attorney for the
District of Massachusetts

DISTRICT OF MASSACHUSETTS, Sept. 29, 1952

Returned into the District Court by the Grand Jurors and filed.

s/ Joseph J. Duwan
Deputy Clerk

[fol. 4] • • •

[fol. 5] • • •

[fol. 6]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Transcript of Hearing

Court Room No. 3, Federal Building,
Boston, Massachusetts.
Monday, October 27, 1952,
11:25 a.m.

The Court: I suppose I ought to hear you first, Mr. Callahan, on this motion for a new trial, motion for arrest of judgment.

Mr. Callahan: Well, I would suggest, if your Honor please, that I be heard, first, on the motion on arrest of judgment.

The Court: All right. Use your own order.

Mr. Callahan: Well, Judge, this case went to the jury on three counts. Count No. 1 alleged that the defendant Green entered this bank with the intent to commit a felony. Count No. 2 alleged that he robbed the bank. And Count No. 3 alleged that he robbed the bank, putting people in fear by use of a dangerous weapon.

Now the jury returned a verdict of guilty on the three counts. So that until the verdict of guilty was returned on the third count, why, the defendant Green was in a position where he could not plead that conviction as a double jeopardy. So having convicted him on the third count, why, we argue to your Honor that that conviction on the third count was a jeopardy and that he could not be convicted on the first and second counts because under the Rules of Criminal Procedure in this Court, Rule 31 says that the defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Of course, I submit that if a man is found guilty of robbing a bank and putting people in fear in so doing [fol. 7] necessarily that conviction includes entering the bank with the intent to commit a felony and includes

robbing the bank also. There is no question at all, I submit, that if that was the situation before this trial began, if before this trial began there was a conviction on this third count outstanding, namely, that Green did rob the bank and put people in fear, that conviction could be pleaded as a jeopardy to an indictment alleging that he entered the bank, an indictment that alleged that he robbed the bank. And, of course, it was impossible, as I said in the beginning, for the defendant to take advantage of the Fifth Amendment of the Constitution until the jury either had acquitted or convicted, and, of course they didn't know, they didn't do that until they came in with their verdict on the three counts. And the only way it suggested itself to me to bring that matter before the Court in a legal way is to make a motion in arrest of judgment. Consequently the motion has been filed asking for that judgment to be arrested on Count No. 1 and Count No. 2 and assigning as reasons therefor, first, that on the record this Court is without jurisdiction of the offense set out in said count because said offense was embraced and included in the offense alleged in Count No. 3 of said indictment on which last count, Count No. 3, he, the said Theodore Green, was convicted by a jury in this Court on said date, and, two, that to impose judgment and sentence on said Count No. 1 constituted double jeopardy and punishment in violation of the Fifth Amendment of the Constitution of the United States.

The same applies to Count 2, which is also included in the Motion to Dismiss and Arrest of Judgment.

I feel sure, Judge, that there are a number of cases that suport the contention of double jeopardy and, of course, the double jeopardy also includes double punishment. That briefly sets out the reasons for the motion for arrest of judgment.

[fol. 8] The Court: Have you filed any motions, Mr. Juggins?

Mr. Juggins: No. I had in mind to follow Mr. Callahan along that same thought, not probably agreeing with all suggestions made but with some thoughts of my own, I would do so. My idea about that phase of it would be that, reading back to the time that the original motion was filed, to strike out Count 1, your Honor at that time

thought that that might await evidence which might be offered later, which would indicate that Count 1 and Count 2 did not necessarily conflict one with the other. In other words, that the charge of entering a bank with intent to commit a felony and the robbing of a bank might well mean that the bank might be robbed outside of the bank itself and there would be no conflict in the two counts. Actually, as the evidence developed—

The Court: That would rather prove they are two separate offenses—entering the bank with intent to rob and robbing it, separate offenses.

Mr. Juggins: Yes, your Honor.

The Court: Not so with respect to Count 3. Count 3 is laid as an aggravation of Count 2, actually robbing the bank. That is not a separate offense that we discussed during the trial.

Mr. Juggins: Well, if the third count, that of an aggravation of the robbery by the use of a weapon, that is inclusive again of Count 2 and, of course, of Count 1.

The thought strikes me, if there is a sentence on the three counts, as found by the jury, that is Count 1 of entering the bank, Count 2 of the robbery, and Count 3 robbery with aggravation, we have in effect three different offenses instead of the one set forth in Count 3. If that were so, it seems to me we have a repetition of offenses, and I am concerned as to how a disposition should be made of the three—the fact three counts have [fol. 9] been decided by the jury to have warranted a conviction. That is the first thought I had.

Necessarily, if sentence is imposed on Count 3, we have a question of disposition on Count 2 and—

The Court: Well, it might seem that Count 2 might be merged into Count 3, because Count 3 is an aggravation of Count 2. But the indictment isn't laid so that there is an aggravation with respect to Count 1, which is a separate offense. I thought I would point that out to you.

Mr. Juggins: My thought would be it must be an aggravation if Count 2 is inclusive of Count 1.

The Court: That might be so, Mr. Juggins, if Count 1 was included in Count 2. But I think a great many of the cases that reviewed this particular bank robbery stat-

ute have said that Count 1 and Court 2 are separate offenses.

Mr. Juggins: There is one case that I—

The Court: I have a very practical method of dealing with the question of double jeopardy, if there is anything in what Mr. Callahan says, which I will display later, I hope.

Mr. Juggins: I had a case. I am assuming your Honor has made a thorough examination of the case.

The Court: I have made an examination of it, of course.

Mr. Juggins: I had in mind citing, if I might, your Honor, the case of Wilson against the United States, 145 Fed. 2d 734, and that has a quotation in it, in a situation where the defendant pleaded guilty to both counts. That is, Count 1 was based on the old section, 588, which is 2113 in the modern version of it, and Count 2. The defendant had pleaded guilty on both counts and was sentenced to serve a year to six months on each count to run consecutively. It was later vacated and the defendant was sentenced to seven years and six months on Count 1, two years and six months on Count 2, the sentence to run consecutively. And the court, I am quoting now, said:

[fol. 10] "Subsection (b), as we construe it, does not define an offense distinct from the offense defined in subsection (a). It does prescribe minimum and maximum penalties for an aggravated form of the offense defined in subseciton (a). These penalties are in lieu of, and not in addition to, those prescribed in subsection (a).

It is clear, therefore, that counts 1 and 2 charged a single offense. Since count 2 charged aggravating circumstances and count 1 did not, appellant should have been sentenced on count 2 and should not have been sentenced on count 1.

The sentence on count 1 was invalid for reasons just stated."

There they have taken the position sentence should be solely on Count 2. Well, then the thought occurs to me: What are they going to do with Count 1? There has been

a conviction here. The defendant had pleaded guilty. Yet the jury have found on a separate charge, in an indictment charging a distinct offense, have found this defendant guilty. Notwithstanding that the second count might be inclusive of the first count. That was the count I suggested to your Honor should be stricken in the first instance because it was inclusive.

Mr. Callahan: Could I say one more word, Judge?

The Court: Yes.

Mr. Callanan: These counts, Judge, as drawn are not drawn as different descriptions of the same act but they are drawn as specific offenses, so that I would suggest to your Honor that in that state of the indictment, why, it couldn't be cured by imposing a sentence on the whole indictment; it couldn't be cured by imposing a sentence on Count 3 and sentences on Counts 1 and 2 to run concurrently with Count 3.

That would be true if the counts were drawn and al- [fol. 11] leged to be different descriptions of the same crime. They haven't done that here. They have drawn their counts, each count setting out a specific crime.

The conviction on Count 3 is a jeopardy to those other two counts. So, I submit that the defendant Green is entitled to have his motion in arrest of judgment allowed.

The Court: Motion for a new trial and the motion for arrest of judgment are denied.

Mr. District Attorney, I will hear you on sentence.

Mr. Hassan: May it please the Court, may I first address my remarks to the defendant Green. This defendant is thirty-five years of age, married, and has two children. He has been at odds with the law since his juvenile days. He has gone from bad to worse. His family life has been one for which he could personally accept no credit. He has allowed his wife and children to become objects of charity and welfare over a period of many years while he has been roaming throughout the country in an endeavor to get by on his wits.

He is well known to the police of Boston as a criminal, a man who would stop at nothing in order to obtain his ends.

He has served many years in Houses of Correction, Reformatories, and the State Prison.

It is my opinion that in these days when it is hard to pick up a newspaper without finding where somebody has been held up at the point of a pistol that we most certainly should make an example of this type of criminal who comes before this Court. We also should do what we possibly could to have the sentence act as a deterrent toward men who might be of the same ilk as Green. In my opinion he's a killer. He is wanted in other bank robberies now. I have been advised he is wanted down in Maine for a bank robbery, which he and the defendant Jacobanis were engaged in at the Westport Bank of Maine.

He has had little or no occupation. As a matter of [fol. 12] fact, during the days he did work his family received absolutely no benefit from it. The probation report indicates he says he has been a costume jewelry salesman. The investigation which the Federal Bureau of Investigation conducted in this case clearly shows there isn't a bit of truth in it.

He is now doing a sentence of 15½ to 20 years in State Prison. I don't believe there is any hope for rehabilitation in this case. I think it is our plain duty to see to it that men of this type are kept out of circulation.

As to the defendant Green, I am going to recommend for your Honor's consideration that he be sentenced to serve a term of 25 years in an institution to be designated by the Attorney General, and that this sentence commence at the expiration of the sentence which he is now serving under the State authorities.

The defendant Jacobanis is 42 years of age, was recently married, and has one child. He is an alien. He has been in trouble from the time he was thirteen. He grew up in a section of the City where I live and have lived for many, many years. I know something personal about his juvenile days. He was sentenced to the Lyman School when just a boy.

I may have my figures wrong, but in looking over the Probation Report and also the FBI Report, he has served approximately 22 years of his life in institutions of various kinds. Something that the report does not reflect too strongly is that even when he was sentenced, on

one of his sentences to State Prison, he was placed in solitary for a long period of time as a result of a vicious assault which he committed on a fellow inmate, and on another occasion he was placed in solitary by reason of the fact he attempted to escape.

In 1940 he was sentenced to serve a term for armed robbery of 10 to 15 years in State Prison. He got out [fol. 13] in 1950 and got a job at the Hunt-Spiller Company in South Boston. The Probation Report says that he worked from December of 1950 until December 12 of 1951. That, of course, is a typographical error because, of course, the record shows he gave up his job on September 12. As a matter of fact, his parole ended on August 30 or 31.

Our investigation shows that the only reason why he worked at Hunt-Spiller was because he was on parole, that he stated he felt he was just doing an added year of hard labor, and just as soon as he had the opportunity to get off parole he gave up that job.

He is a cool, cold, calculating individual, very quiet, apparently very mild-mannered, and yet back of it all he too is a vicious criminal, another killer.

But for the grace of God there may have been some killing at the Norwood Bank. This Mrs. Kalliel, who attempted to leave the bank, was pushed down into a chair by the defendant Green, and a gun stuck in her ribs.

I feel that the maximum sentence should be imposed on both of these men. I do not believe that there is any chance of rehabilitation. And I think we should make certain that at least for a long, long period the public will have just two less to worry about. And, therefore, I recommend for your Honor's consideration as to the defendant Jacobanis that he, too, be sentenced to serve a term of 25 years in an institution to be designated by the Attorney General.

Mr. Callahan: If your Honor please, of course we didn't argue the motion for a new trial. Your Honor has already ruled on that.

The Court: I would be glad to hear you. I thought you waived any argument on that. I may be wrong. I would be glad to hear you. Maybe I acted a little too hurriedly. I will hear you on the motion for a new trial, if you wish.

Mr. Callahan: If your Honor please, it was said to the [fol. 14] jury in substance, as attorney for the defendant Green, We are not so much concerned with the question as to whether he is guilty of this crime or not as we are on the issue as to whether the government proved it by credible evidence. Now there cannot be any question that on the early afternoon of September 13, two men went into the Norwood Bank and stole money that they left there and made a getaway so-called in an automobile.

The automobile was identified as an automobile of a certain number, and it was found that it had been stolen earlier that day out at Milton, I think, and had been returned sometime before 4 o'clock that afternoon.

There were a number of witnesses brought in here from the bank, employees and customers, and people who were in the vicinity, and none of those witnesses could identify the two robbers, identify the two robbers so-called, except in a very general way to say that one was a thin man and one was a fat man, one was a man that weighed about 200 pounds.

So that the government's case as it went to the jury depended entirely on the evidence of two, we might call them, State witnesses, namely; Roccoforte and the testimony of Bistany.

I submit that there was absolutely no legal corroboration of either of those witnesses' testimony. Roccoforte testified in substance that he had stolen a car, that the car was used, according to him, or turned over to him—to Green and Jacobanis, and that later that day he got a telephone call from Green, Green telling him that he was out there in the woods and he couldn't leave there until dark because there was a road block thrown up by the police to apprehend them.

Well, of course, necessarily that couldn't have been so because on this evidence if the Oldsmobile that has been identified in this case was the Oldsmobile that was used [fol. 15] that Oldsmobile was returned to the parties sometime before four o'clock. And the witness Roccoforte spoke about or testified that the night before this September 13 incident, why, he with Green had stolen another car, and that they were stopped by some police officers. Certainly that hasn't been corroborated.

Of course, I can't take up your Honor's time arguing that because you probably have read the results of that investigation as well as myself. So that you have got at least two instances where it has been demonstrated that the defendant Roccoforte was not telling the truth.

Bistany testified that on one occasion down in Pawtucket that Green told him that they had gone to some place in Milton, I think he said, where they remained, and that then they went to Pawtucket, and after going to Pawtucket they went back to Boston.

Well, of course, that can't be so, if this Oldsmobile, that has been the subject of evidence here, is the Oldsmobile that was used—because to repeat again, the evidence showed that the Oldsmobile was returned to the parking space sometime before 4 o'clock.

So that the government's case, I submit, depended entirely on the testimony of those two witnesses uncorroborated in any respect. And you have the defendant Roccoforte admitting that he planned this robbery, admitting that he stole the car that was or could be said to be used in the robbery, that he apparently knew what went on in the bank, and he knew what went on in the course of the getaway after the robbery.

And he fits the needed description that was given by the witnesses of the bank as the man who jumped over the counter. And the testimony was that that man had a shiny revolver in his hand. And if you go back to Bistany's testimony, Roccoforte owned a revolver at about [fol. 16] that time that answers the description of the revolver in the hand of the man that jumped over the counter.

And to top that, he comes into court here and he pleads guilty to the robbery. And it was argued to the jury that the fact that he knew that this Mrs. Kalliel, if that is the name, was pushed down, and the fact that he knew that the car almost hit a baby carriage as it was making its getaway, that that was some corroboration of the testimony. I don't have to argue to your Honor that that wasn't legal corroboration.

He could know those things and it is logical that he knew them because he was present there at the time and that he was one of the men who took part in this robbery.

And who says that he wasn't? The only one that says that he was not is himself. That's all. There are no witnesses who were there at the bank who were asked to look over Roccoforte. And strange to say, there were no witnesses at the bank or in the vicinity of the bank that were ever asked to look over these two defendants.

And we have got the situation of where there are at least eight or nine witnesses who are present when a robbery is committed and when suspects are picked up for that robbery, not one of those witnesses are ever brought down to confront the men to see whether they could identify them. So that we have got the situation that it can well be argued that Mr. Roccoforte was one of those men that went into that bank and on the evidence was the man who jumped over the counter, because he fits the meager description of that man who jumped over the counter.

On the evidence there were two men who went into that bank. Well, if Roccoforte is one of them, who was the other? The other man, the man who is supposed to have stood out in the lobby, is described as a fat man, a man that weighed 200 pounds. Well, certainly the defendant Green doesn't fit that description.

[fol. 17] Now in addition to that there was a mass of evidence that went in here that was prejudicial to the defendant Green. The fact that he met Roccoforte while both were doing a State Prison sentence, the fact that Bistany testified against him up in the Worcester Court—extremely prejudicial evidence to present to a jury.

And your Honor will recall that except for the testimony of Roccoforte that he had this telephone conversation with Green, stating that Green couldn't get away, when we know that that could not have been so, and as a result of that went down and got a package containing money from Mrs. Green—absolutely no corroboration of that on this evidence.

So that as you examine and analyze the evidence you are driven to the conclusion, in order to convict here the jury must have taken Roccoforte's testimony a hundred per cent.

Now I am not going to argue to your Honor that the law in this court is that an accomplice must be corroborated, but I argue to your Honor that the cases say that

the better practice is for the court to instruct the jury that they are to consider whether there was corroboration or not.

The Court: I told the jury that.

Mr. Callahan: Well, your Honor didn't give the instruction that was asked.

The Court: No. I agree. I didn't give the one that was asked because I was asked to instruct the jury that the evidence of the accomplice needed corroboration, which wasn't so. I instructed the jury they should give such testimony utmost scrutiny, and it would be well to look around—they didn't have to—but it would be well to look around for corroborating testimony.

Mr. Callahan: So that there was the issue, as I submit, for the jury as to whether they were going to believe [fol. 18] Roccoforte's testimony or not. The testimony of Bistany was absolutely uncorroborated.

And if it has come to the time when a man who takes part in a robbery can come in and relate facts that point to him being a party to the robbery and simply say, "Well, I know part of this because I heard it," as he says, "because he, Green, told me about it," I submit that it's pretty tenuous evidence on which to convict a man of a serious crime.

This case took, as I recall it, some eight days to try. The jury came to a conclusion here in a matter of an hour and a half. I don't argue to your Honor that a jury has got to waste time. I suggest to your Honor that the verdict was brought in in a pretty short space of time, considering the important issues that were at stake here.

There are other pieces of evidence that were testified to by Roccoforte that, of course, must stand because the defendants were not in a position to produce the evidence to contradict it at that time. I haven't, of course, made a motion for a new trial on the ground of newly discovered evidence, so I won't take up your Honor's time arguing that phase of the case.

I have filed a motion for a new trial, and I have set out a number of reasons why we feel that this verdict should be set aside. I have also filed a motion for a ruling of law on the motion for the new trial.

Your Honor has indicated what your attitude is on those motions. I won't take up your time unnecessarily arguing further.

Mr. Juggins: May it please your Honor, on the motion for a new trial, as I have it in mind, it should be directed to the question of whether or not the findings of the jury were warranted or whether or not the weight of the evidence did warrant their findings. As the case progressed, your Honor, I think your Honor would be inclined to [fol. 19] agree with counsel for these defendants that up to the time that Mr. Roccoforte and Mr. Bistany took the witness stand that the government had failed entirely to connect either Green or Jacobanis with this robbery, that not one of the many witnesses advanced were able to identify even one or either one of the defendants and, therefore, I think we would have been justified as counsel for these defendants up to that time to say that the government had not been able to maintain its allegations.

And then Roccoforte was produced, an accomplice according to his own story, a man who had admitted and pleaded guilty to this offense, and the government is obliged to rely on the testimony of an accomplice and a man named Bistany.

Bistany I can dispose of in a few words. I feel warranted in saying that if Bistany were the only one who testified and not Roccoforte that your Honor would not have felt warranted in believing Bistany's testimony. I can't for the life of me see how anyone could give any credence at all to that type of person, and I dispose of him in that manner.

Mr. Callahan has called your Honor's attention to the many conflicting statements made in Roccoforte's testimony. I have the feeling that Roccoforte had a reason for testifying here. He expected leniency as a result of that testimony. And under those circumstances it might well be he would exaggerate and distort evidence for the purpose of accomplishing a certain result, and that is the conviction of these two men.

I have in mind a story told by Roccoforte that he went out to saw wood, and an intimation or inference might have been drawn from the story as to the circumstances under which he first went to Norwood, that he

went out there with the intention in the first instance of casing, as they have called it, this Norwood bank. I felt [fol. 20] as the story unfolded that he went out there to avoid apprehension on a matter that was pending in Maine where some offense was committed up there and for which he has since been doing time and of which he has been convicted. That while he was out there he looked over other places to consider whether or not they could take—that he or whoever might be joined with him would take a favorable view—whether or not they ought to be attacked so-to-speak. That he looked at the Grant concern, an incidentally he looked at the Norwood Bank.

And at that time an interesting phase occurred that I think suggested a clear question to him, when I asked him, that if while he was at Norwood looking over these different places, if it wasn't his thought at that time to participate in person with any attack made at those several places he looked at, and he admitted that he did have that in mind, that he was going to actively participate in any effort made to rob any place at Norwood or those places which he looked over.

And that seemed to me a bit inconsistent with his story, as he told it here. The night before, and apparently for some few days before this time, there had been some suggestion or some thought in his mind at least that this bank should be robbed, and Roccoforte is primarily in the midst of that discussion for that purpose. And he tells about, as far as Jacobanis is concerned, he met him about a week before, and he tells that he met him in the morning a week before at Sullivan Square. I think the record showed actually that Jacobanis was at work at the Hunt-Spiller Company on that particular morning.

And then just the day before that robbery, September 13, he was again meeting Jacobanis on September 12, another day that Jacobanis was working.

Well, those inconsistencies in his story are such that I submit they go to his credibility. But to follow the [fol. 21] thought that I think Mr. Callahan has advanced as to whether or not Roccoforte went so far as to take a position here, that he had no activity in the participation of this robbery, here is a man, Roccoforte, that the day before, and we know something about this—we can gather.

something about his background—he says that he stole a car, that car to be used in the perpetration of this robbery, that he did not succeed in getting that car that day, and repeated the effort the next day. This man who at the time he was at Norwood was going to actively participate in a robbery steals a car the next day, and drives it as far as Roslindale, and then says that he stopped there and got out and left the place.

Well, it's hard to conceive of a man who had in mind some time back he was going to actively participate in this robbery, who participated in the arrangements made to carry out that purpose, who attempted to steal a car to carry out the purpose on the day before the robbery is committed, and on the very day that the robbery took place he takes part in the stealing of a car and then drives it out part-way, within ten or fifteen minutes drive or ride to Norwood, and then he gets out.

Now the time for him to have gotten out, if he didn't intend to participate actively in this robbery, was about the time that they got the car. No. He proceeds along towards Norwood, stops at a filling station to get gas—an opportunity to stop there at Roslindale. Then he tells that he got out. Well, it's strange that at the last moment he says that there was no need of three men participating, that it was only a two-man job, and he gets out of the picture.

Did Roccoforte actually participate in that robbery? Certainly a man who is willing to participate in a robbery of the type that he is—it's a rather peculiar thing that at the last moment he should change his mind about it while [fol. 22] on the way to the place where the robbery was finally committed.

His conscience, of course, didn't bother him. He had the nerve to do it, because we know the type, and yet he says he didn't participate.

Now in a motion of this sort, of course Mr. Callahan or myself have no other thought but to see that the defendants are entitled to a trial, a fair trial, that the evidence which should warrant a conviction is the kind of evidence that is credible and would warrant a conviction. Here, I think, if we are going to rely on that type of

testimony we have got to the point where certainly the weight of the evidence is not in favor of the government.

The Court: Did you want to say something?

Mr. Callahan: Yes, sir. Judge, the defendant Green is now 37 years of age, was born and lived in Boston all his life, and has been married since 1937. In 1949, while over at State Prison, while at work he fell, I think, three floors with the result that he injured his left arm. I think he was hospitalized over there for almost two years.

He was sent to the Massachusetts General Hospital for treatment, and when he was released from State Prison, why, he was not in condition to go to work, with the result that his family did get State Aid, but it was because at that time, why, he was physically incapacitated to work.

His occupation just prior to his arrest on these offenses, he was a partner in a Syrian Club down in the South End. He informs me that he took care of his family since he got through or recovered from the injury to his arm. Even now his left arm is practically helpless.

Now on October 2, about four weeks ago, Green was sentenced in the Worcester Superior Court, the State Court, to 15½ years to 20 years, which sentence he is now doing over at State Prison. He is also under indictment, I think, in this Court for robbery of the Medford [fol. 23] Bank, the Middlesex County Trust Company. He is also indicted up in Maine for robbery of a bank up in Maine, and there are indictments pending against him, one in the Norfolk Superior Court, the State court, on this Norwood Bank robbery; and there is also an indictment pending against him over in Middlesex County for robbery of the Middlesex County Bank.

So that any sentence that is imposed on Green in this Court at this time automatically is going to prevent his chance of getting any parole on the State Court sentence of 15½ to 20 years until he has practically done his minimum time minus any good time allowed him.

So, your Honor can see Mr. Green has quite a long road ahead of him. He is now doing somewhere in the vicinity of 15 years in the State court before he starts to do any time on whatever sentence your Honor may

impose. If he is convicted of any of these other offenses undoubtedly he will get time on those.

So that to repeat again, why, Mr. Green is going to be under lock and key for a good many years, so many years that by the time he does get out, why, all the fire will be out of him and there will be no expectancy that he could be in condition to take part in any other robberies or any other offenses as far as that goes.

So I ask your Honor, while I agree with the fact he has other offenses pending that might result in sentence, decisive on any disposition you may make, I ask your Honor to consider that in determining just what disposition you are going to make of Green's case. He has got two children, one fourteen years of age, one nine years of age. He has got a wife. Notwithstanding what the District Attorney has said, he informed me he has supported them, except for the time he was incapacitated, when they were getting State Aid, because he could not work.

Mr. Green, 37 years of age, has a long road to travel. [fol. 24] I ask your Honor to be as lenient in your disposition as you feel your duty to the public requires.

Mr. Juggins: May it please your Honor, as the government attorney has stated, Jacobanis is 42 years of age, is married, has a child four or five weeks old. I suppose that the result here hardly warrants my stressing much the fact that he is married, and no question can arise but what he was devoted to his wife.

He went to State Prison in 1940. He served 10 years there. From the time he got out—about the time he went to work, 1949, in December at the Hunt-Spiller Company, the work he performed there was arduous, heavy manual labor. He worked there steadily, your Honor, from December. The only time he was out during that period from December up to September 12, 1951, was when there was a strike, a two or three-week period at the factory or plant, and another occasion when he was out, I think, a week.

During that time he apparently comported himself so far as working and applying himself to the work with regularity, saving what money he could.

Of course, as he would admit, no question about it, he took part in other avocations. He gambled, booking or whatever to augment whatever income he could derive. Then in September of 1951 he became involved, according to the story here, with Roccoforte. He is 42. It is a fact there is an indictment or complaint of some sort pending against him with reference to an offense committed in Maine. I am not aware of any other indictments or complaints otherwise pending against him.

I want to argue the Maine proposition from two viewpoints. One is that if it is advanced to show the type of man that he is or the character that he is, it is unfair to anticipate the result of the trial of that offense up there. He might well be found Not Guilty. Therefore, I doubt [fol. 25] if your Honor would give too much consideration to the fact that there is an indictment pending against him up there.

I realize that it is a rather serious offense on which he has been convicted. Not unlike Mr. Green, of course, who hasn't any other matters pending against him, where there has been a conviction, I think he started out when he got out of State Prison to do a really good job. I heard from the clergyman who was here, with whom apparently he was on good terms, and the clergyman put himself out to volunteer to come forward to say that there was a chance for rehabilitation of this man. Of course, substantial sentence means he would be confined for some years and never have the opportunity of seeing his child grow. He will have lost the companionship of a devoted wife during that time.

It might appear to be appealing to your Honor's sentiment. It isn't that thought. It's a practical situation. It's part of his punishment, one that I think your Honor might well take into consideration.

Under those circumstances—your Honor is a just and, I might add, a lenient man. I think your Honor has a full and complete view of this man, his environment, his prospects of what he would be if he got a long, long sentence, and what the result would be indirectly. And all I can suggest to your Honor is to give that phase of it your consideration.

The Court: Well, with respect to the motion for a new trial, which I agreed to reconsider in the light that counsel wanted to argue the case, where I thought, not having said anything about that motion, they had waived it. Mr. Juggins points out the type of testimony in the trial, the testimony of Roccoforte and Bistany, two men with long term criminal records, Bistany going back to Sing Sing for the rest of his life and the other man up in jail in Maine. But as the District Attorney argued, the govern- [fol. 26] ment must take its testimony, its evidence, where it can find it, and the only place it could find it with respect to these men who pursue this type of industry is among themselves. It's the same old story. It takes a crook to catch a crook. You can't catch them very easily otherwise. Now with respect to the testimony of Bistany and Roccoforte. True, as we all knew at the trial, and as I told the jury, the case was mainly a case of circumstantial evidence, but I very carefully instructed them, of course, that it was of equal dignity with direct evidence. There was some direct evidence on the part of Bistany. The admissions that were made from the mouths of these defendants in my opinion, of course, was direct evidence and more or less corroborative of what Roccoforte testified. Of course his testimony was all circumstantial. As counsel for the defendants know, as carefully as I could I instructed them with respect to the principles that are applicable to circumstantial evidence.

But I, sitting here during the two weeks the case was tried, was convinced that at least Roccoforte was telling the truth. The details that he related convinced me, although I wasn't the finder of fact, that these men had committed that robbery in that bank, the mass of detail he wove into the case, and I think truthfully too. True, he was looking for some sort of revenge because some one of these had overreached him in the Maine job, where he lost the $3500 automobile and Jacobanis, the accused, left him destitute with respect to his defense. But that's the only time—both you men, skilled in the trial of cases on the criminal side of the Court, know that is the only time there comes a rift with respect to these men. These men might have come in here for revenge.

There was some motivating power that put them in here testifying on this stand. I will put one side Bistany's testimony. But Roccoforte's testimony with all [fol. 27] the details with respect to the stolen car, the number of the car, the type of car, and what he did and what these three defendants did, it seemed to me to fit right into the picture, and the jury thought so too. I thought the verdict of the jury was well warranted on the evidence. I think without question of doubt they were warranted in finding these men guilty on the evidence beyond a reasonable doubt.

And for those reasons the motions for a new trial are denied.

Now with respect to the question of sentence, an important matter, these men we have here, gentlemen of the defense, are a menace to society. They are what we call bandits and gunmen. They would not hesitate to kill in the Worcester case. As I understand it, with respect to Green, that man up there was shot through the neck by one of these bandits, either Murray or Green or the other participant. I think you know as well as I do that they would not hesitate to use their guns. They are killers. They are a menace to society.

I agree with the District Attorney that the only protection or deterrent for them so they might reform—they'll never reform. These two mad men will never reform. If they were released from State Prison tomorrow they would go out robbing banks or robbing innocent individuals. I don't say that as a guess. That's exactly what they did. Jacobanis worked over at Hunt-Spiller's while he was on parole, but the minute he was off parole, 12 days later we find him, in my opinion from the evidence, the evidence justified it, in that robbery out there. Green was the same type. He was released—and this man Roccoforte was the same type—he was released from State Prison, and they're right back with these revolvers in their hands ready to kill if somebody got in their way.

They deserve no consideration. They are what I call mad men. The only protection society has got is to wall [Tr. 28] them off, fence them off from society just as long as the Court is able to do it. There isn't one word that can be said in their defense. There is not one word

that can be said, I think properly, that would warrant a Court in believing these men could be rehabilitated.

Their records date back for the years almost without end—30 years back as far as Jacobanis is concerned—1923, and the record of Green goes back to 1931. Serious crimes: Robbery, larceny, breaking and entering, use of guns all over their entire careers.

Mr. Clerk—

[The Court and Clerk confer.]

The Clerk: David Jacobanis and Theodore Green. David Jacobanis, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment 20 years, and on Count 3 of the indictment 25 years; said prison sentence to run concurrent, and you are now placed in the custody of the Attorney General until your sentence be performed. Mr. Marshal, the prisoner is now in your custody under sentence of the Court.

Theodore Green, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment that you be imprisoned for 20 years, and on Count 3 of the indictment that you be imprisoned for the period of 25 years, said prison sentence to run concurrent and to begin upon your release from prison upon the sentence you are now receiving under order of the State Court.

[fol. 29] IN UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

(SEAL) No. 52-130 Criminal

UNITED STATES OF AMERICA

v.

THEODORE GREEN

VERDICT, JUDGMENT AND SENTENCE—October 27, 1952

On this 27th day of October, 1952 came the attorney for the government and the defendant appeared in person and[1] by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offenses of entering a bank with intent to rob (vio 18 USC s 2113(a)); robbing a bank (vio 18 USC s 2113(a)), and robbing a bank under aggravated circumstances (vio 18 USC, s 2113(d)) as charged[3] in 3 counts in Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] 20 years on Count 1, 20 years on Count 2, and 25 years on Count 3, said prison sentences to run concurrently, to begin upon release of defendant from prison upon sentence now being served by him under order of State Court.

FILED IN CLERKS OFFICE JUN 14 1955

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IT IS ADJUDGED that[5]

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ Francis J. W. Ford,
United States District Judge.

The Court recommends commit to:[6]

JOHN A. CANAVAN,
Clerk.

A True Copy. Certified this 5th day of August 1960.
JOHN A. CANAVAN
Clerk

(By) Eleanor T. Forry
Deputy Clerk.

[fol. 30] IN UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

RETURN BY THE UNITED STATES MARSHAL FOR THE DISTRICT OF MASSACHUSETTS

On October 27, 1952 in the United States District Court at Boston for the District of Massachusetts, United States District Judge Francis J. W. Ford sentenced the within named Defendant THEODORE GREEN to a term herein described.

On May 16, 1955, the sentence imposed by the Massachusetts Superior Court at Worcester, Massachusetts on October 2, 1952, under which the defendant THEODORE

GREEN was confined at the Massachusetts State Prison at Charlestown, Massachusetts was vacated by the Massachusetts Superior Court, and on the same day, I took the said defendant THEODORE GREEN into my custody, by virtue of this Judgment, and recommitted him to the Massachusetts State Prison at Charlestown, Massachusetts in accordance with instructions from the Bureau of Prisons.

Thereafter on June 2, 1955, by written directions of James V. Bennett, Director of the Bureau of Prisons dated May 31, 1955, I took the body of the within defendant THEODORE GREEN from the Massachusetts State Prison at Charlestown, Massachusetts and on June 3, 1955, I delivered him into the custody of the United States Marshal for the District of Columbia for further committment.

s/ Robert H. Beaudreau
United States Marshal
District of Massachusetts

Received THEODORE GREEN from Robert H. Beaudreau, United States Marshal, District of Massachusetts, Boston, Massachusetts this 3rd day of June, 1955, and further committed him over to the custody of the Warden of the United States Penitentiary, Alcatraz Island, California, this 6 day of June, 1955.

CARLTON G. BEALL,
United States Marshal,
District of Columbia

s/ Joseph G. Orito
Deputy U.S. Marshal

[fol. 31] IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Cr. No. 52-130

UNITED STATES OF AMERICA

vs

THEODORE GREEN, DEFENDANT

MOTION TO VACATE SENTENCE

(Rule 35, Fed. Rule Crim. Proc.)

Comes now the defendant, Theodore Green, and moves that the sentence imposed in the above entitled case on October 27, 1952, be vacated and set aside for the following reasons, among others, to wit:

1. The judge did not orally pronounce the sentence from the bench.
2. The judge and clerk conferred on the length of the sentence to be imposed out of hearing of the court reporter and the defendant.
3. The judge did not afford the defendant an opportunity to speak before imposition of the sentence as required by Rule 32(a) Fed. Rule Crim. Proc.

The defendant attaches hereto a Memorandum made in support hereof.

WHEREFORE, it is respectfully prayed that the aforesaid sentence be set aside as the law and justice require.

s/ Theodore Green
THEODORE GREEN
Box 1180
Alcatraz, California.

[fol. 32]

IN UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Criminal No. 52-130

UNITED STATES OF AMERICA

v.

THEODORE GREEN, ET AL

OPINION—June 15, 1959

ALDRICH, D. J.

This is a motion to vacate sentence under Rule 35 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., the pertinent portion of which is as follows, "The court may correct an illegal sentence at any time." Accompanying the motion was no filing fee, but an affidavit which the clerk construed as being in forma pauperis so as to eliminate the necessity of a filing fee. This affidavit made no reference to the defendant's citizenship. Without instructions from me the clerk filed the motion on the civil side and wrote the defendant that his affidavit was defective because of the lack of showing of citizenship. He erred in both respects. The motion belongs on the criminal side, in the original case. See Heflin v. United States, 358 U.S. 415, 418 n. 7; Cook v. United States, 1 Cir., 171 F 2d 367, cert. den., 336 U.S. 926; Ekberg v. United States, 1 Cir., 167 F. 2d 380. The clerk is directed to make the transfer.[1] I proceed to the merits.

[fol. 33] 1. The first ground of the motion is that the sentence was announced orally by the clerk; following a

[1] With respect to the lack of allegation of citizenship, I note that defendant has previously filed such an affidavit in this court. Since I judicially know he has been in Alcatraz ever since, I will not assume that he has changed his citizenship, but will assume a continuance of status. However, this is now moot, as no filing fee is required on the criminal side.

conference off the record between the clerk and the court. Defendant states that the judge, (not the present writer), should have spoken himself, rather than the clerk for him. It is not alleged that the judge was not physically present on the bench, and I of course assume that he was. It is common practice for a sentence to be imposed in this fashion. The clerk was performing a ministerial function only, in the presence and at the direction of the court, and the words are the court's. There is no merit in this contention of the defendant.

2. The second ground alleged is, "The judge and the clerk conferred on the length of the sentence out of the hearing of the court reporter and the defendant." The transcript, so far as this matter is concerned, is accurately set forth in the motion. It merely shows, "(The court and clerk confer)." There is nothing improper with the court conferring with the clerk at any time. I will not assume, in the absence of any showing, and none is suggested, that at this conference anything took place other than that the court instructed the clerk as to the sentence to be announced. What I have already said on point one takes care of that matter.

3. The only claim worthy of any extended discussion is the allegation that "the judge did not afford the de- [fol. 34] fendant an opportunity to speak before imposition of the sentence as required by Rule 32(a) Fed. Rule Crim. Proc." In his motion the defendant does not adequately set forth any factual basis for this statement. I will, however, in the interest of saving time, since doubtless the motion could be amended, take note of the transcript which was filed in connection with defendant's original appeal, as the record herein. This shows that counsel addressed the court, and thereafter sentence was pronounced as aforesaid.

Rule 32(a) provides that "the court shall afford the defendant an opportunity to make a statement in his own behalf." It has been suggested that this requires the court affirmatively to ask defendant whether he wishes to say anything himself. See Couch v. United States, D.C. Cir., 235 F. 2d 519. Even in that case the court applied this principle prospectively only, and not to in-

validate a sentence already imposed. See Howard v. United States, D.C. Cir., 247 F. 2d 537. Personally, it seems to me difficult to say where the court listened to counsel, and there was no indication that it was not equally prepared to listen to the defendant as well, that the court did not "afford the opportunity" to speak simply because it did not invite it. When defendant is not represented by counsel he should of course be informed of his right by being so invited. I question whether a defendant competently represented should need this instruction from the court. If the framers of the rule felt otherwise, they could have used the affirmative word "offer," rather than the passive "afford".[2]

[fol. 35] In any event, I subscribe to what was said in United States v. Miller, D.C.S.D.N.Y., 158 F. Supp. 261, at 264, that "the defendant has not shown that if he had been offered the opportunity to speal in person he would have added anything to that which his counsel already had said . . ." It is not without significance that the defendant was sentenced in 1952, and this is the first time he has made this complaint, although he has made many others previously, in 28 U.S.C.A. § 2255 proceedings. Even now he does not say that he wanted to say anything at the time, or what he would have said.

The defendant's motion to vacate sentence is denied. I see no reason to allow his attendant motion to appoint counsel for him. However, since he has no counsel I instruct the clerk to mail him a copy of this opinion forthwith by airmail, and I advise him if he wishes to appeal it is possible he may have only ten days to file.

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[2] The analogy suggested by Judge Fahy in the Couch case that a defendant must be personally present during trial, and cannot be represented simply by counsel, does not seem to me apposite. There are much broader reasons for that. I must admit, however, that on occasion I have inquired of a defendant even though represented by counsel, whether he personally wished to say anything in his own behalf. This "admission" on my part may be inconsistent with my pronouncement that such inquiry is not a necessary action. If it seems desirable in some cases, perhaps it should be done in all. The fact that the defendant almost invariably declines the invitation is, of course, immaterial to the present question.

plus such further time as the Court of Appeals might extend to him because of his distance from the District. See Rules 37, 45(b) and (e), Federal Rules of Criminal Procedure, 18 U.S.C.A.; compare Gonzalez v. United States, 354 U.S. 978 (per curiam), reversing 1 Cir., 233 F. 2d 825, with Heflin v. United States, supra.

s/ Aldrich
U.S.D.J.

[fol. 36] IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

STATE OF CALIFORNIA)
COUNTY OF SAN FRANCISCO) SS

Case No. Cr. 52-130

AFFIDAVIT IN FORMA PAUPERIS—Filed June 22, 1959

Theodore Green, having been sworn according to law deposes and says as follows in support of his motion.

1. That he is currently serving 26 years 7 months and 2 day term for violation of Title 18 Section 2113, U.S.C.

2. That he is a layman unschooled at law and prepared his moving papers in this court.

3. That he is a citizen of the United States by birth and a poor person within the meaning of Section 1915 (a) Title 28, United States Code.

4. That he is proceeding in this court in forma pauperis.

5. That the motion presents questions of law unsettled in the First Circuit.

6. That he is appealing this motion to the United States Court of Appeals in good faith because he verily believes that he has a meritorious cause.

WHEREFORE, petitioner prays that he be permitted to appeal from the Order of June 15, 1959, denying motion filed under Rule 35, Federal Rules Of Criminal Procedure.

Respectfully submitted

Subscribed and sworn before me this 18th day of June 1959.

Associate warden
U.S. Penitentiary, Alcatraz

[fol. 37] IN THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

No. Case. Cr. 52-130

UNITED STATES OF AMERICA

vs

THEODORE GREEN

NOTICE OF APPEAL—Filed June 22, 1959

Name and address of Appellant—Theodore Green, Box 1180, Alcatraz Calif.

Concise statement of judgment—25 years on verdict of guilty for violation of Title 18, Section 2113.

Order appealed from—Denial of motion filed under Rule 35.

Date of order—June 15, 1959 (received by appellant 5:00 P.M. June 17 1959)

Name of judge—Honorable B. Aldrich.

Notice is hereby given of appeal of the above designated ORDER to the United States Court of Appeals for the First Circuit.

Theodore Green
1180 Alcatraz Calif.

[fol. 38]

IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 5547

THEODORE GREEN, PETITIONER, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT, APPELLEE

Appeal from the United States District Court for the District of Massachusetts

Before WOODBURY, *Chief Judge*, HARTIGAN, *Circuit Judge*, and GIGNOUX, *District Judge*

Theodore Green, pro se, on brief for appellant.

Elliot L. Richardson, United States Attorney, and *William J. Koen*, Assistant U. S. Attorney, on brief for appellee.

OPINION OF THE COURT—December 8, 1959

PER CURIAM. Theodore Green, who is at present serving a sentence of 25 years' imprisonment for bank robbery in violation of Title 18 U.S.C. § 2113 and who has wasted the time of this court before by fruitless appeals, see *Green* v. *United States*, 238 F.2d 400 (1956), and *Green* v. *United States*, 256 F.2d 483 (1958), *cert. denied* 358 U.S. 854 (1958), moved in the court below under Criminal Rule 35 to be resentenced for the following reasons: 1) the judge did not orally pronounce sentence from the bench himself but permitted the clerk to do so, 2) the judge, before sentence, conferred with the clerk, it is asserted as to the length of the sentence to be im-
[fol. 39] posed, out of the hearing of the court reporter and the defendant, 3) the judge did not afford the defendant personally an opportunity to speak in his own behalf before the imposition of sentence as required by Criminal Rule 32(a). The District Court denied the motion and Green thereupon took the present appeal.

There is little for this court to say except that we endorse the views expressed by the court below in its opinion reported 24 F.R.D. 130 (1959).

The record shows that the judge was on the bench when, as is the common practice, at least in this circuit, sentence was announced orally by the clerk. And we wholly agree with the court below that in announcing the sentence the clerk was only performing a ministerial function in the presence and at the direction of the court so that actually the words of the clerk were the words of the court. We are not aware of any reason whatever why a judge cannot direct the clerk to speak for the court in announcing sentence. The cases relied upon by the appellant are so out of point that it would be a waste of time to distinguish them.

The appellant's second contention is wholly without substance. It is certainly not improper for the court to confer with the clerk at any time. Nor is there anything in the record to indicate that the object of the court's conference with the clerk before sentence was imposed was other than for the court to tell the clerk the sentence he was to announce.

As to the third contention, it appears that Green was represented at his trial by an able and experienced criminal trial lawyer of his own choice, see *Green* v. *United States*, 256 F.2d 483, 484 (C.A. 1, 1958), and that counsel addressed the court at considerable length in mitigation of punishment before sentence was imposed.

Perhaps, as suggested by the court below, it might be better practice in all cases for the court before passing sentence to ask the defendant personally if he wished to [fol. 40] make a statement in his own behalf or present any information in mitigation of punishment. See *Couch* v. *United States*, 235 F.2d 519 (C.A.D.C., 1956). At least, that procedure would prevent any question of compliance with Criminal Rule 32(a) from ever arising. But we are certainly not prepared to say that the Rule requires personal solicitation of a defendant to speak in his own behalf when he is represented by competent and experienced counsel of his own choice, when counsel has had a full opportunity to speak and has spoken at length for

his client in mitigation of punishment, and has been allowed to present any information there may be bearing on that matter. Moreover, there is nothing in the record to show that Green, either personally or through his counsel, asked to speak in his own behalf or requested permission to add anything to what his counsel had said. Nor is there any indication in the present motion or the supporting brief as to what, if anything, Green might have been able to add in elaboration of the statements of his counsel.

Judgment will be entered affirming the judgment of the District Court.

[fol. 41] IN UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

• • • • •

JUDGMENT ENTERED DECEMBER 8, 1959

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was submitted on brief for appellant, record appendix thereto and brief for appellee by leave of Court.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk.

Approved:

/s/ PETER WOODBURY, C.J.

Thereafter, on December 24, 1959, mandate issued and the original papers were returned to the District Court.

• • • • •

[fol. 42] SUPREME COURT OF THE UNITED STATES

No. 596 Misc. ——, October Term, 1959

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—April 18, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to question No. 3 presented by the petition which reads as follows:

"3. Whether the judgment was invalidated where the court did not offer the petitioner an opportunity to speak before sentence was imposed."

The case is transferred to the appellate docket as No. 870 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960 564980 310

PETITION NOT PRINTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 179

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 30, 1960
CERTIORARI GRANTED JUNE 27, 1960

Supreme Court of the United States

OCTOBER TERM, 1960

No. 179

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

THEODORE GREEN

MOTION FOR CORRECTION OF SENTENCE

(Rule 35 Federal Rules Criminal Procedure)

Comes now Theodore Green, and respectfully moves that the Judgment and commitment in the above entitled case be corrected to reflect that the twenty-five year term imposed under Count III, is invalid and void for the following reasons, among others, to wit:

1. When the court imposed the sentence of 20 years on Count I it exhausted its power and sentence on Count III is invalid and void.
2. The sentence on Count III is invalid and void because the jury was not properly instructed as to the law applicable to Subsection (d) of Title 18, U.S.C.A. 2113, and no verdict responsive to that subsection could be found by the jury and the Court was without power to impose a sentence under that subsection.

The defendant files herewith a memorandum in support and made part hereof.

WHEREFORE, the petitioner respectfully prays that the judgment and the commitment be corrected to reflect that that the sentence imposed under Count III is invalid and void.

(s) THEODORE GREEN
THEODORE GREEN
Box 1180,
Alcatraz, California

[fol. 2] MEMORANDUM

October 15, 1959

WYZANSKI, D. J.

October 9, 1959 the Clerk's Office received defendant's motion for correction of sentence.

The first point presented by the motion is that the sentence of 25 years imposed by Judge Ford on Count III is invalid and void because when Judge Ford imposed a 20 year sentence on Count I the Court exhausted its power.

It appears from the record that in one document Judge Ford *simultaneously* imposed upon defendant a 20 year sentence on Count I for violation of 18 U.S.C. § 2113 (a), a concurrent 20 year sentence on Count II for violation of 18 U.S.C. § 2113 (a), and a concurrent 25 year sentence on Count III for violation of 18 U.S.C. § 2113 (d). As a matter of law it may very well be that following conviction the crimes covered by Count I and Count II were merged in the crime covered by Count III, and that defendant would be entitled to have the sentences under Counts I and II set aside. *United States* v. *DiCanio*, 2nd Cir., 245 F.(2d) 713, 717. But there is no authority or reason for setting aside the sentence on the third Count. It was within the limit set by 18 U.S.C. § 2113 (d). It was a sentence which ran not[2] consecutively but concurrently with two sentences each for shorter periods of time. And the *DiCanio* case shows that it is irrelevant that the judge uttered his sentence with respect to Count I a few seconds before he uttered his sentence with respect to Count III.

The second point of the motion is that Judge Ford did not properly instruct the jury. This point cannot be raised by this motion, filed pursuant to Cr. Proc. Rule 35, [fol. 3] for correction of a sentence imposed October 27, 1952. And if it could be raised it is without merit.

Motion denied.

(s) C. E. WYZANSKI, JR.
United States District Judge

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[2] As reproduced in the appellant's "Appendix to the Brief," the word "not" was inadvertently omitted.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR CORRECTION OF SENTENCE—
October 15, 1959

WYZANSKI, D. J.

A motion for correction of sentence having been filed on October 9, 1959 in the Clerk's Office and having been duly considered, it is

ORDERED that the motion be denied.

By the Court

(s) MIRIAM M. WYNN
Deputy Clerk

(s) C. E. WYZANSKI, JR.
United States District Judge

Order entered
October 15, 1959

[fol. 4] IN UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

TRANSCRIPT OF HEARING

Court Room No. 3, Federal Building
Boston, Massachusetts
October 22, 1952.

CHARGE TO THE JURY

The Court: Members of the jury, before we come to the indictment in this case, the charges made against this defendant, there are matters that I want to cover with you and the first matter that I want to cover is respective to these here—you, the jury and I, the Court. As you know, it is my duty to lay down certain principals of law that cover this case.

First, certain general principles of law that cover every criminal case, and then certain applicable principles of law that cover the case we are trying here today, Mr. Foreman and members of the jury.

In the first place our duties are two-fold. That is, it is for me to charge you on the law, tell you what the law is, and it is for you to decide the facts. Not only does a Court instruct a jury with respect to principles of law but in this court, in the federal court, the court is empowered to comment on the evidence, to point out the important evidence; that is, what it thinks is the important evidence, and also to give its opinion of the evidence, the facts embodied in the evidence, if it so desires, provided the Court makes it known to the jury that in the last analysis no matter what the Court says, the facts [fol. 5] are for the jury.

So you see our duties are two fold, I to lay down the principles of law and you to find the facts based on the evidence. Now, you have got to apply the law that I have given to you. If I am wrong, in error, as you know or as I tell you, whatever errors I commit may be corrected in the Court of Appeals and possibly the Supreme

[fol. 6] Court of the United States but if you think you know more law than I and you apply your own law and you commit an error, there can be no review of the error because no one will know what law you applied, so you cannot apply any versions of law you may have yourself. You must apply the law as laid down by the Court. This is all summed up in this phrase: the facts are for you, the law is for the Court.

Now, in determining the facts, where the truth lies, of course as you know you must pass upon the credibility of the witnesses. What witnesses do you believe? What part of his testimony do you believe and what part of his testimony do you reject? That is all for you, the credibility of the evidence, because that is what you have to base your verdict upon, upon the credible evidence, the evidence which you believe, the facts which you find from the evidence.

Now, there are certain guides for you. You do not have to follow these guides. I can't tell you what guides to follow or what rules to follow in passing upon the credibility of the evidence but the cases are filled with suggestions to juries as to how to pass upon the credibility of the evidence, the credibiilty of the witnesses in the case, and here are some of the considerations that I recommend to you. I don't say you must apply these but you may, as you see fit.

The appearance of the witness on the stand, the consistency of the story told, the interest, if any, contradictions, if there are any, the candor or lack of candor of the witness, his intelligence and means of information, his bias or prejudice, if any, his accuracy of recollection, the reasonableness and probability, or lack of them, of the testimony that the witness gives.

If you find that a witness has willfully falsified concerning a material fact you should disregard that false [fol. 7] testimony and you may disregard any and all testimony given by that witness. On the other hand you may disregard the false testimony and accord whatever weight you think the remainder of his testimony deserves.

The jury has a twofold obligation, as the courts have said, to assist in the enforcement of the law and protect

those unjustly accused of crime. The Government obviously wants no innocent man convicted but on the other hand it insists and has a right to insist that tryers of fact such as you are allow no guilty man to escape. It is important in a Government such as our Government that laws be enforced not only for the maintenance of Government but also for the protection of each one of us in our security and safety.

In protecting the innocent and convicting the guilty you are not to be influenced by passion, prejudice, public opinion or sympathy. You are to weigh dispassionately and consider the evidence and the law in the case and give to it your conscientious judgment. You are to decide the case on the evidence and only on the evidence you have heard in this courtroom and not from anything you heard or read before or since you became jurors in this case.

Now, the defendants in this case are charged with the robbery of a bank under aggravated circumstances, as you know now, having listened to this case. An indictment has been returned against them but I charge you the fact that an indictment has been returned against them by a Grand Jury is no evidence that they committed such a crime. The indictment is the result of an investigation made by the Grand Jury. It is a charge notifying the defendant that the Government claims they violated the law and the defendants are not to be prejudiced in any way by the fact that an indictment was returned charging them with the crime of robbery under aggravated circumstances.

A defendant at all times is presumed to be innocent [f l. 8] and such presumption remains with him from the beginning of the trial and the presumption prevails throughout the trial until overcome by evidence which satisfies you beyond a reasonable doubt in accordance with certain requirements I shall refer to in a moment that he is guilty.

The burden is upon the Government to prove the defendant or defendants are guilty beyond a reasonable doubt. The burden is on the Government throughout the trial and never shifts. The defendants are not obliged to prove themselves innocent.

I have told you each essential element of the crime must be proved beyond a reasonable doubt before there can be a conviction of either of these defendants. It is necessary to define that term and it has been defined extensively in the Supreme Court and in the other courts. Reasonable doubt is such a doubt as would affect the mind and judgment of the ordinarily reasonable and prudent man in making decisions on important matters. It is a doubt based on reason. Proof beyond a reasonable doubt has been defined correctly as not beyond a possible or imaginary doubt but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof to a moral certainty as distinguished from an absolute certainty. Proof beyond reasonable doubt does not mean that the burden is upon the Government to prove its case beyond all possible doubt. That principle was stated in this manner by one of our superior courts [reading]

> "It does not mean, however, that the Government is obliged to prove the charge beyond any and every doubt whatever—only beyond a reasonable doubt.

A mere fleeting uncertainty or whimsical doubt not substantial and not based on reason does not have to be excluded by the evidence. The term reasonable doubt means a doubt which is substantial and not merely shadowy. It does not mean a doubt born of reluctance [fol. 9] on the part of a juror to perform an unpleasant duty, or a doubt arising out of sympathy for a defendant or out of anything other than a candid consideration of all the evidence presented."

While the Government has the burden to prove every essential ingredient of the crime charged beyond a reasonable doubt and the defendant has the benefit of this rule from start to finish, the defendant is only entitled to the doubt that a rational, sensible person would hold with respect to the evidence and this rule with respect to reasonable doubt is equally applicable to both direct and circumstantial evidence, a matter that I shall refer to later in my charge.

A principle applicable to criminal cases akin to, if not a part of the rule requiring proof beyond a reasonable

doubt is that where, in the light of all the other evidence, the fact is as reasonably consistent with an inference of innocence as of guilt, that fact may not be regarded as evidence of guilt. But an act, apparently innocent when viewed by itself, may be combined with other facts found by the jury and give rise in that connection to an inference different from such as might be drawn were it to stand alone and unconnected with anything else.

Moreover, if all the facts found by the jury are fairly open to two interpretations, one innocent and the other wrongful, guilt is not established, but if all the facts found by the jury and put in their proper relations show guilt, they are then or may be regarded as undoubtedly inconsistent with innocence.

Another rule applicable to this case: the defendants, neither one, have taken the stand and testified. With respect to that Congress has passed a statute, Title 18, Section 3481 of the Code and it reads as follows [reading]

> "In the trial of all * * * persons charged with the commission of crimes—against the United States—the [fol. 10] person so charged shall at his own request be a competent witness, and his failure to make such a request shall not create any presumption against him."

What I have just said means that a defendant is not obliged to testify unless he desires to, and if he does not testify, he shall not be prejudiced thereby. The failure of the defendant to take the witness stand in his own behalf must not be considered by the jury as an element against the defendant nor be permitted by the jury in its deliberations to militate against him.

Now, a warning to you: bear in mind that no statement of mine as to the principles already laid down or of any other applicable legal principles which I shall state and have to state hereafter, is to be construed by you as an expression of the Court's opinion as to the guilt or innocence of the defendants on trial. Whether they are guilty or innocent is for you, not for me.

Also keep in mind that evidence stricken out during the trial cannot be considered by you as having any bearing

on the result. If counsel has intimated by questions which the Court has not permitted to be answered that certain things are or are not true, you must disregard such questions and refrain from any inference based upon these questions. Statements by counsel concerning the facts in the case are not evidence unless they are proved and you must look to the proof to determine what the facts are. Of course any stipulations—we have had one or two stipulations in here, calling to your mind what the stipulation is or was, there was an agreement between counsel, that is all that means. An agreement between counsel that the .32 cartridge found in the car of the witness who testified here could not be fired from the .38 calibre revolver found on one of the defendants or was testified to was found on one of the defendants.

Now, Mr. Foreman and members of the jury, with those [fol. 11] principles in mind we come to the indictment in this case. These defendants are charged with violating what is commonly known as the Bank Robbery Act; Section 2113 of the Code.

The indictment is laid in three counts. The first count charges that they entered the bank with the intent to rob it and the second count charges that they actually robbed the bank. Those are two separate offenses, entering the bank with intention to rob it and robbing it. Because of the fact at times a case might involve entering the bank with the intention to rob it and the robbery not taking place, here the Government charges that not only these defendants entered the bank in the first count with the intention of robbing it, but in the second count the Government charged they actually robbed it. I have told you that these are the bank robbery provisions of the Code.

The third count is a different type of count. That is not a separate offense. I will speak to you later of the manner in which you will handle the third count. That is not a separate offense. What the Government charges in that count, count 3, is they committed the robbery, the offense charged in count 2, in an aggravated manner. That is, they assaulted and put in jeopardy lives of certain persons by the use of a dangerous weapon. That is not a separate count, to repeat, that is an aggravation of the second count, robbing the bank.

To make it a little clearer to you, although I think I have made it eminently clear at the present time, I will read to you sections of the Code, the statutes, that are involved here. Unless an offense is set down or laid down by Congress in statute, it would be no offense against the United States. There is no common law jurisdiction of crime in the United States. I won't go into that subject but any crime—you cannot commit a crime against the United States unless Congress denominated it as a crime. [fol. 12] The first count of the indictment, I said, charges these defendants with entering the bank with the intention to rob it. I will read the section of the Code with respect to that, the pertinent parts at least. [Reading]

> "whoever enters or attempts to enter any bank * * * with intent to commit in such bank * * * any felony affecting such bank—"

and so forth and so on, would be a violation of the law.

Well, what the Government charges here is that they entered that bank, as I have already told you, for the purpose of robbing it. The robbery section of this statute.

Robbery, as you know, is taking away the property of a person against his will by force and violence and putting him in fear and that is what this section of the statute points out; robbery. Whoever, by force and violence, or by intimidation, by putting in fear, takes or attempts to take from the person or presence of another any property in his custody may be found guilty if the evidence warrants it, of the crime of robbery.

The third count with respect to the aggravated aspect of it, whoever, in committing or in an attempt to commit any of these offenses that I have already pointed out in these two sections, entering to rob and robbing, whoever committed these offenses, and assaults any person or puts in jeopardy, in danger, jeopardy means, the life of any person by the use of a dangerous weapon, and so forth, may be punished in accordance with the statute.

So to sum up at the risk of repetition, we have three counts, first, entering with the intent to rob; second, the

actual robbery of the bank; and third, committing the robbery set forth in the second count under aggravated circumstances, to wit, by the use of a dangerous weapon.

With respect to count 2 the charge is the actual robbery. You will have this indictment in the jury room and at that time you can probably follow it a little better than [fol. 13] you are following it now but it will be clear, as crystal, I believe, when you get into your Jury room where the indictment will accompany you.

With respect to count 2, the actual robbery of the bank, whether or not the Government charged that the defendant robbed the bank, took the property of the bank by putting in fear the custodians of the money.

Two persons, if a person or two persons point a pistol or pistols at a third person who has custody of the money while in close proximity to him or them, in consequence of which the property or money in his care or their care is taken away and against their will, there can be no doubt that this amounts to robbery. That is practically a repetition of what I have said already—and a violation of the statute and also, as charged in count 3, the aggravation aspect, it amounts to an assault and putting in jeopardy the life of the person by use of a dangerous weapon.

Now, that brings us down to what the issues are in this case. What are the matters that you are going to decide? Decisions based upon the evidence in that case and as counsel pointed out, they are simple, the issues are. Counsel does not mean, nor do I mean, it might be simple to reach a determination, but the issues are simple and they are these: did either one of these defendants here, Jacobanis or Green, in the first count, enter that bank for the purpose of robbing it? On count 2, did either one or both actually rob the bank? Of course where two men are charged jointly with a crime the jury might under certain circumstances, if the evidence warranted, find one guilty of the robbery and one not. In this case the Government charges that both of these defendants entered the bank, robbed it and robbed it under aggravated circumstances.

To repeat, the question with respect to count 1, which you will have before you, is, did either or both these de-

[fol. 14] fendants enter the bank for the purpose of robbing it and under count 2, did they actually rob it, either or both? Under count 3, the question is, did they rob the bank under aggravated circumstances, put in fear the life of a person by the use of a pistol?

Now, Mr. Foreman and members of the jury, you are to convict or acquit either or both of these defendants solely upon the evidence. I have said this to you a great many times. You have heard in this courtroom and, in considering, you have a right to draw reasonable inferences from the evidence, whether the evidence be a strict statement of fact or circumstances which you may have where you may not have direct proof of a fact. In this case there are many facts you have no direct proof of but you may have circumstances from which you are able to draw reasonable conclusions and deductions.

As counsel for the defendant have pointed out, there is a great mass of circumstantial evidence in this case but you remember I told you that the rules with respect to reasonable doubt apply to circumstantial evidence as well as direct evidence and I have already told you in the charge that I have just given to you immediately before I came to this aspect of the charge, that you can convict a defendant on circumstantial evidence as well as direct evidence if you find that the circumstantial evidence warrants a finding that the crime was committed beyond a reasonable doubt.

To explain to you the difference between direct and circumstantial evidence, direct evidence is what we see, what we hear or what we smell or what we taste; an application of the senses. That is direct evidence. I see the foreman of the jury before me now; that is direct evidence. If he stood up and spoke to me, that would be direct evidence; I would hear him.

Circumstantial evidence, counsel have argued and talked [fol. 15] about, circumstantial evidence, and there is considerable circumstantial evidence in this case—in fact most of the facts have been proved by circumstantial evidence—but I charge you that if you find on circumstantial evidence that these defendants are guilty beyond a reasonable doubt, you would be warranted to do so.

Circumstantial evidence is that evidence which tends to prove a fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact is so which it has sought to establish. You remember the old Robinson Crusoe story, and somebody found, Crusoe himself—I am getting old and I don't remember—didn't he find a human footprint in the sand? Of course that was circumstantial evidence to prove there was a human being on that island. He didn't see the human being but he found facts and circumstances from which he could deduce there was a human being on the island. That is a good and classic example of circumstantial evidence. Such circumstantial evidence is entirely proper and legal and can be made the basis of your verdict.

This kind of evidence, however, to warrant a conviction must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense charged to have been committed by a defendant or defendants, or in other words, the facts must be entirely consistent with and point to his or their guilt only and must be inconsistent with his or their innocence.

If the evidence, upon any essential element of the case or upon the whole case, is as consistent with the innocence of any defendant as with his guilt, it is insufficient to warrant a conviction of such defendants.

Counsel have argued extensively with respect to Roccaforte and the fact he is an accomplice and also argued at length the fact that he pleaded guilty and what effect that should have on the jury and I must direct your attention [fol. 16] to these aspects of the case at the present time. During the course of trial Roccaforte, who undoubtedly on his evidence, if you believe it, was an accomplice, pleaded guilty. Roccaforte's confession of guilt inherent in his plea of guilty constitutes no evidence of guilt of either one of these defendants. The guilt or innocence of the defendants is to be determined on the evidence submitted at the trial and all reasonable inferences to be drawn from it.

However, even though Roccaforte's plea of guilty is no evidence of the defendants' guilt, it does not mean you may disregard his testimony. You must consider his testi-

mony and give it whatever weight you wish. Roccaforte, from his testimony, as I have said before, is and may be referred to and has been by counsel as an accomplice. The rule is that the testimony of an accomplice should be scrutinized with care and any promise, expressed or implied, from the circumstances, made to him and any indebtedness of his to the Government should be taken into consideration in weighing his testimony.

It is not the law, however, that you are obliged to reject the testimony of Roccaforte because he is an accomplice. His testimony is entitled to such weight as you decide to give it in view of all the circumstances of the case.

There is no rule of law to the effect that in order to be believed the testimony of an accomplice must be corroborated but it is important in weighing the testimony and credibility of such a witness to look to other circumstances proven in the case which may furnish corroboration of his testimony. In other words, to sum that up, it does not have to be corroborated. You can convict if you believe it on his testimony alone but it is well to be careful with respect to the manner of carrying out this instruction of the Court to view it carefully, to look around for some corroboration.

The evidence in this case, as I have said, was generally circumstantial evidence and I have charged you you can [fol. 17] convict if you can believe it, of all the elements of the crime, beyond a reasonable doubt, on circumstantial evidence but I want to point out to you there was some direct evidence in the case and the direct evidence was adduced in this trial by the witness Bistany.

He testified at the Hotel Arnold in Murray's car, as I remember it, another person who was associated with these—as he testified down at Pawtucket that both of these defendants admitted that they committed this robbery of the Norwood Bank. That would be direct testimony of the commission of the crime by these defendants and if you believed him, if you believe that evidence adduced by Bistany upon the stand, which is direct evidence, you will be warranted in the event you did believe it, Mr. Foreman and members of the jury, in finding these defendants guilty.

Now, there are some things in this case I must point out to you, that there is no controversy at all about, and counsel pointed that out to you, counsel for defendants and counsel for Government point out to you. The defendants' counsel do not dispute that a robbery of the Norwood Bank was committed. There is no question on this evidence that a finding that a robbery was committed could be found, and they don't deny that.

What they do deny, that either or both of these defendants, Mr. Juggins for Jacobanis said he was not concerned with the crime, and Mr. Callahan for defendant Green contends that is their position. They say that the defendants they respectively represent were not concerned in the crime but they do agree that the bank was robbed.

And then there is no contention in respect to the third count of the indictment, that whoever robbed that bank put in jeopardy the lives and the persons who had custody of that money by the use of a dangerous weapon. The evidence in the case pointed to that and counsel for [fol. 18] the defense do not dispute that fact so we have those facts to put to one side.

As I said earlier in my charge the simple question may be difficult to reach or it may be easy to reach. I take no position on that but the question is whether or not either one of these defendants robbed the bank.

There is another burden upon the Government here to prove with respect to their case, that this bank was insured in the Federal Deposit Insurance Corporation. This was a state bank. This court would have no jurisdiction of a robbery of a state bank ordnarily but it has jurisdiction of a robbery of a state bank when the bank is insured in the Federal Deposit Insurance Corporation. That insures the funds in a state bank and that is so, the fact that we have jurisdiction of the robbery of a state bank when it is insured in the Federal Deposit Insurance Corporation, by virtue of a section of the statute, 2113, Section (f) of the Code. [Reading]

> "As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institutions organized or oper-

ating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

The burden was on the Government to prove beyond a reasonable doubt, that being one of the elements of this crime, that the deposits of the Norwood Bank were insured in the Federal Deposit Insurance Corporation. Counsel didn't argue that point because the evidence here was abundant to show that it was a bank, in the first instance, and, in the second instance, it was a state bank and there was documentary evidence to show here it was insured in the Federal Deposit Insurance Corporation. There was no denial of that evidence so on that evidence, [fol. 19] if you believed it, you would be warranted in finding this bank was insured in the Federal Deposit Insurance Corporation.

Now, with respect to the evidence in the case where there is the controversy, it seems the controversy revolved about the credibility of the evidence presented here and the credibility of Roccaforte, who presented his evidence here with which you are familiar and it was argued at some length and at great length by all the counsel in this case, both for the defense and for the Government and I don't know, Mr. Foreman and members of the jury, without making this charge unduly long, that I should go over that evidence. It is fresh in your mind. You heard Roccaforte here testify how he met Jacobanis out in Norwood, just to go over some parts of it, and how they were at Norwood. That is what he testified to, and then how he and Green stole that car out there in the Back Bay and the incident of the police officers and then you heard the other evidence of the ownership of this blue automobile that was stolen from that lot out there were Roccaforte says he stole a blue car with the number testified to here by the owner and the testimony of the occupant of the pharmacy with respect to the number of the car that was concerned in the robbery.

Now, Roccaforte did not see the crime committed. Consequently that is what is referred to as circumstantial evidence. If you believe it, you can convict and there is compliance with the rules I have laid down with respect

to reasonable doubt on circumstantial evidence, with respect to direct evidence. I have already pointed out to you the direct evidence of Bistany that both of these defendants admitted they committed that robbery. Then you have heard all the other evidence about— I don't think I need to review it at all because it was admitted the robbery was committed and that goes over five or six or seven or eight or nine witnesses, I think, that were [fol. 20] presented to show the robbery was committed. And then Roccaforte came to testify and then Bistany came to testify.

And the Government, as you know, it is obvious, places chief reliance to prove that these defendants are guilty on the evidence of these men so that the credibility, in accordance with the rules that I said you may apply, is the important matter in this case. Do you believe these witnesses or do you not? That is the question for you to decide.

Finally, members of the jury, in considering the evidence here in the case if you find the Government has not satisfied you or persuaded you beyond a reasonable doubt that these defendants robbed the Norwood Bank, you should acquit. If, on the other hand, you were satisfied that the Government proved every element of the offense beyond a reasonable doubt with respect to either or both and they committed the offenses as charged, you will find them guilty.

In order to find either defendant guilty a verdict must be unanimous, Mr. Foreman and members of the jury, and represent the decision of each individual juror.

The object of the jury system is to create a unanimous verdict of guilt or innocence in a criminal case through the exchange of views, reasons and arguments among the several jurors. Although the verdict should represent the considered judgment of each person, a juror should not refuse to listen to the arguments of other jurors, equally intelligent and equally earnest in the effort to mete out justice.

When you return to this court you will be asked to return an oral verdict. There are no written verdicts in criminal cases, as distinguished from civil cases, which you will be familiar with when we come to try some civil

cases, but in a criminal case the verdict is returned orally and when you return to this court after your deliberations [fol. 21] the Clerk of the court will ask you whether or not you have reached a verdict on each count of the indictment, count 1, count 2 and count 3.

As I have said to you earlier in the charge, you will deliberate and return a verdict on each count. Count 1, is either or both defendants guilty or not guilty; count 2, the same; count 3, the same. And you will have the indictment and the exhibits with you in the jury room to aid you in your deliberations.

Now, members of the jury, if you will bear with me one minute I will talk to counsel and listen to whatever they wish to say with respect to any matters I omitted or with respect to those matters I have been in error about in my charge.

[Conference at the bench:

Mr. Callahan: If your Honor please, I direct your attention to request No. 9.

The Court: No, I won't give that. I refuse that. Objection noted.

Mr. Callahan: I direct your Honor's attention to request No. 12.

The Court: I won't give it in that form. I think I have covered it in another manner. Objection noted.

Mr. Callahan: I suggest your Honor hasn't said anything about bias and prejudice of a witness.

The Court: I did talk about any favor or whatnot in talking about accomplices.

Mr. Callahan: We don't—

The Court: I don't think you are right when you say that. In passing on the credibility I read to them, if you will bear with me a minute—the candor and intelligence and bias or prejudice, if any. I know I said that because I read it from the Chandler case.

Mr. Callahan: I would ask your Honor to give [fol. 22] the balance of the request, to say that if they determine that a witness is testifying through bias or prejudice, that they—and they are satisfied he has

not testified truly in the case, that they may disregard his testimony altogether.

The Court: I have said that a great many times. I told them they could disregard any testimony that was false. Willfully falsify a material fact, you should disregard that false testimony and disregard any and all testimony given by that witness. Whether it is caused by bias or prejudice or whatnot, I don't think is important. If it is false is the important thing. Whether it is from bias or prejudice or no bias or prejudice, he is a plain, downright liar. I think I have covered that amply.

Mr. Callahan: I might suggest No. 12 is a quotation from Pinkerton versus United States, 145 Fed. 2nd.

The Court: I don't disagree with it but I don't give it in that form. If he hasn't testified truly, of course they should kick him out and find the defendants not guilty. After all that connotes they find his testimony false. Certainly I left the impression they should not find them guilty on false testimony.

Mr. Callahan: But if they find he is biased and prejudiced, that is the reason for his testimony—

The Court: I won't give it in that form. I think I have covered that amply.

Mr. Callahan: All right, then, we would have an objection.

The Court: Oh, sure, for not giving it in that form. I don't have to give them in the form you suggest. Certainly I don't have to quote from these, unless I want to.

Mr. Callahan: No. 14

[fol. 23] The Court: I told them to take into consideration the fact as to whether any promises were given, and so forth, for his testimony.

Mr. Callahan: Would your Honor let us have an objection for your refusal to give 14?

The Court: I can't prevent you from having an objection. Certainly you can have an objection.

Mr. Callahan: 16.

The Court: I thought I did very well for you in

that charge. I went a little further than I thought I would yesterday on that.

Mr. Callahan: I would suggest to your Honor that the corroborative evidence ought to be corroboration of some fact that connects the defendant with the crime, not some immaterial matter. Just as I argued to the jury.

The Court: I don't think I want to change it. I think I was very fair in what I said about that. I said in scrutinizing the testimony of the accomplice to look around for some corroboration. I thought that was fair to you.

Mr. Callahan: What I have in mind, Judge, is the explanation of what corroborative evidence is.

The Court: Everybody knows what that means. It is a common term. Supporting evidence. To back him up.

Mr. Callahan: But in a criminal case it has to be supporting evidence of some material that connects the defendant with the crime.

The Court: I haven't any doubt about that. I didn't think the jury would regard it they would have to connect somebody else with the crime.

Mr. Callahan: I will take an objection.

The Court: Sure. In fact I am afraid the Court of Appeals will say I went too far.

[fol. 24] Mr. Callahan: Now 17.

The Court: I didn't refer to that. I won't give it.

Mr. Callahan: All right; objection and exception.

The Court: That was taken out of a case where somebody wrote an opinion. During the trial I did instruct them with regard to statements made after arrest. Maybe that doesn't hit that on the nose but I won't change it.

Mr. Callahan: 18, if your Honor please, I think we are entitled to that in view of the argument of the District Attorney.

The Court: I have said so. I referred to the zeal and so forth and so on.

Mr. Callahan: Yes, but the District Attorney in his argument to the jury stated that there was no evi-

dence that connected that gun in any way with the robbery.

The Court: I don't think—.

Mr. Callahan: No, and I think we are entitled to have that stated to the jury. Particularly in view of the admission of the District Attorney in his argument.

The Court: I didn't think there was any contention made by the Government that that gun was connected.

Mr. Jones: My memory of it was Mr. Hassan said we didn't claim that gun was used in the robbery.

The Court: I think so.

Mr. Callahan: Then we are entitled to an instruction that there is no evidence.

The Court: No. If he admitted it and the jury had it before them, that's that. I don't, in my charge, have to reargue the case for the defendant.

Mr. Callahan: Now, the last is 19, Judge? I think we are entitled to that,

[fol. 25] The Court: No, I won't give 19. I will leave it in the form I gave it and I thought I was very charitable to him.

Mr. Callahan: Objection.

The Court: Absolutely.

Mr. Callahan: Again, Judge, not being too familiar, I don't understand you say "objection and exception"; you just say "objection".

The Court: You say either one and you will be perfectly safe. Didn't I tell you if you got to the Court of Appeals, your record shows your exception. For instance, you failed to point out I didn't give one of these and later on you wanted to bring it to the Court, I would be the last judge in the United States to say you couldn't bring it because you didn't bring it in a timely fashion.

Mr. Callahan: I was under the impression you have to get these things on the record.

The Court: That's right. I have no criticism of you at all. But I say if there was an omission I think it should get on the record anyway. We are here to do justice, not to trick people.

Mr. Juggins: Are you finished?

Mr. Callahan: Yes.

Mr. Juggins: The only thing I have in mind was that No. 9.

The Court: That has been bothering us since the beginning of the trial.

Mr. Juggins: That is the one we originally raised a question on.

The Court: I won't change it. There are two separate offenses charged without any question of doubt.

Mr. Juggins: Well, your Honor—I suppose I have to save my rights. That was all I had—

[fol. 26] The Court: Jacobanis objects to the failure of the Court to give instruction No. 9. They follow the same order?

Mr. Juggins: I am quite certain.

The Court: If it doesn't, we will take care of it. Is that all?

Mr. Juggins: Most of the other requests which Mr. Callahan has been talking about have reference to Green and Jacobanis. It occurred to me Mr. Callahan had offered records of both Roccaforte and Bistany. I assume that those records might have reference to their credibility which might be another element in the picture.

The Court: Records? Didn't I instruct them when the records went in to consider those in affecting their credibility?

Mr. Juggins: You did that, yes.

The Court: I will leave it there. That's all they went in for.

Mr. Juggins: If your Honor thinks that covers it.

The Court: I think it does. I think so.

Mr. Juggins: That was the only thing I had.

The Court: I remember I did that.

Mr. Juggins: Yes, I know you did.

The Court: I don't think I will do that again.

Mr. Juggins: I don't want them to forget that.

The Court: I don't want to emphasize the point.

Mr. Juggins: Of course we would like you to.

The Court: All right. Are we through, gentlemen? Have you exhausted your requests to me now?

Mr. Callahan: I have.

The Court: Let me discharge the alternate jurors.]

The Court: Now, the original jury that has been chosen, not the two alternates,—the two alternates will [fol. 27] remain in the courtroom but the first twelve men drawn will retire to consider the verdict.

[The jury retires]

The Court: You being alternate jurors, you are now discharged from further consideration of this case. You are discharged, and report here next Tuesday morning at ten o'clock. We will excuse you from the civil cases coming on the rest of the week because I think you have sat here very patiently during this case. Come in next Tuesday morning at ten o'clock. Thank you for your kind attention.

[The jury returned a verdict of guilty on all counts, each defendants]

The Court: Gentlemen of the jury, you may be excused now until next Thursday morning at ten o'clock when you will report here. We won't require you to sit on any further cases this week. Do we all understand, gentlemen? Tuesday morning.

Mr. Hassan: May it please the Court, the Government at this time moves for sentence of these two defendants.

The Court: Is the probation officer here?

The Probation Officer: Yes, your Honor. The reports aren't complete. We haven't received a narrative from the United States Attorney's Office.

The Court: Are your investigations complete?

The Probation Officer: Yes, they are.

The Court: Do you want to give them to me?

[Reports are handed to the Court]

The Court: Do the defense counsel want to be heard with respect to any matter at this point?

Mr. Callahan: Judge, so far as the defendant Green is concerned, we are ready for the disposition but I would like to address your Honor on it.

The Court: Yes, I know. Your attitude probably would be the same, Mr. Juggins?

[fol. 28] Mr. Juggins: Yes, your Honor.

The Court: I am not quite prepared to sentence the defendants at this moment. The probation reports have just been presented to me. I want to read and study those and I want to give some consideration to the matters of law involved with respect to the counts on which the defendants are found guilty and I will postpone the matter of sentence. I am going to postpone sentence until Monday morning at eleven o'clock. I want to give the matter some thought.

Mr. Hassan: In view of the conviction as to defendant Jacobanis I would recommend to your Honor bail be set in the amount of $50,000. It is now $25,000. With surety.

Mr. Juggins; I still understand the original indictment is still pending. On that he was being held for $25,000 and $25,000 on this one and that makes a total of $50,000 he is held on the present moment. The original indictment not having been dismissed.

The Court: Is he held in $25,000 on both of these indictments, Mr. Clerk?

The Clerk: On this one it is $25,000.

The Court: Twenty-five on the other?

Mr. Hassan: It is not my memory at the minute. I don't have my file here, unfortunately. It was my impression the defendant Jacobanis was held in the amount of $25,000 on both indictments. In other words, we did not set new bail on this. The other, Green, was $50,000.

The Court: Let's not leave this to chance. Let us find out.

[A brief pause]

Mr. Hassan: Jacobanis is only in on this case, if your Honor please; he is not a defendant in the other case and I am certain it is $25,000. Jacobanis was only indicted on the Norwood Bank robbery. Sorry I forgot that for the moment.

[fol. 29] The Court: Where is Jacobanis now?

Mr. Hassan: I believe he is at Charles Street Jail and in default of bail, of $25,000 bail.

The Court: With respect to Green, he is confined, is he?

Mr. Hassan: He is confined at State Prison, yes, your Honor.

The Court: So that his bail will remain the same. Is he under twenty-five?

Mr. Hassan: $25,000 in this case and $25,000 in the other case, a total of $50,000.

The Clerk: Theodore Green and David S. Jacobanis, the Court orders you both committed without bail pending sentence.

The Court: Sentence next Monday at eleven o'clock.

Mr. Hassan: If you will be good enough to wait for a moment, I have a motion for dismissal of the other indictment, if you want to take it up at this time.

The Court: There is no hurry about that. We can do it Monday just as well as today.

[Adjourned]

[fol. 30] IN UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

No. 5593

THEODORE GREEN, PETITIONER, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT, APPELLEE

Appeal from the United States District Court
for the District of Massachusetts.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*

Theodore Green, pro se, on brief for appellant.

Elliot L. Richardson, United States Attorney, and *William J. Koen*, Assistant U. S. Attorney, on brief for appellee.

OPINION OF THE COURT—January 20, 1960

PER CURIAM. Petitioner, Theodore Green, was found guilty by a jury in the district court for the District of Massachusetts on a three-count indictment charging, (1) entry into a bank with intent to commit a felony and (2) robbery, both in violation of 18 U.S.C. § 2113(a), and (3) armed robbery, in violation of 18 U.S.C. § 2113(d). On October 27, 1952, he was sentenced to 20 years on Count 1, 20 years on Count 2, and 25 years on Count 3, being the maximum on each count, to be served concurrently. He failed to prosecute his appeal. Starting with this commonplace script petitioner has woven an extensive serial story, the last episode of which was before this court a [fol. 31] month ago in *Green* v. *United States*, 1 Cir., 1959, F.2d . The present installment, a motion under Rule 35, Federal Rules of Criminal Procedure, 18 U.S.C., introduces a new element, and seeks to revive one long departed. Taking this last first, it is that the sentence on Count 3 was "invalid and void" because of error

in the charge. This contention cannot be converted into a Rule 35 matter by the semantic device of alleging that "because of the erroneous instructions no verdict responsive to the allegation of the third count of the indictment was found and hence the sentence of the Court was invalid." Rule 35 is for the correction of illegal sentences, "those that the judgment of conviction did not authorize," *United States v. Morgan*, 1954, 346 U.S. 502, 506, not for the correction of improper convictions. "A motion for correction of sentence under Rule 35 presupposes a valid conviction and affords a procedure for bringing an improper sentence into conformity with the law." *Cook* v. *United States*, 1 Cir., 1948, 171 F.2d 567, 570, *cert. den.*, 1949, 336 U.S. 926. Any errors committed in the charge, or for that matter, any question of the sufficiency of the evidence, were reviewable on appeal.

Petitioner's other point has some semblance of merit, but he attempts to draw from it more than he is entitled to. Petitioner correctly points out that sentencing him on the three counts was, as we stated in *Campbell* v. *United States*, 1 Cir., 1959, 269 F.2d 688, 692, "technically incorrect." With regard to the relationship of Count 1, charging entry with intent to commit a felony, to Count 2, charging robbery, the matter is determined by *Prince* v. *United States*, 1957, 352 U.S. 322. While the actual issue decided in that case was the narrower one of "whether unlawful entry and robbery are two offenses *consecutively punishable* . . ," (emphasis supplied), the court also refers to the broader question of "whether the crime of entering a bank with intent to commit a robbery is merged with [fol. 32] the crime of robbery when the latter is consummated . . ." 352 U.S. at 324. The inference to be drawn from the decision is that it is. Similarly, *Holiday* v. *Johnson*, 1941, 313 U.S. 342, 349, suggests, and there is ample other authority for the proposition, that the offense of robbery, and the offense of aggravated robbery under section 2113(d) are not separate crimes to the extent that consecutive sentences can be imposed on separate counts. See Annotation, 1958, 59 A.L.R. 2d 946, 965-70, 992-94. Strictly, consecutive or otherwise, we hold that petitioner should have received only a single sentence. But we do not agree with him that by the imposition of the 20-year

sentence on Count 1 the court "exhausted its power" to go any further. Many cases have discussed the general problem of an erroneous number of sentences, applying various theories, but, it has been pointed out, "in every instance the sentence on the count which carried with it the greater penalty was held valid." 59 A.L.R.2d, *supra*, at 996. We concur in that result.

The remaining issue, then, is whether petitioner should receive the paper satisfaction, for which relief he has not in fact asked, of having the sentences under Counts 1 and 2 vacated, leaving him only with the single sentence under Count 3. In *Campbell, supra,* we indicated that this was merely a technical matter because the sentences were concurrent, and we refused to vacate the incorrect sentences on the ground that "the defendants are not harmed." 269 F.2d at 692. Had the sentences related to different transactions, at different times, petitioner's opportunity for parole might be affected. See *Hibdon* v. *United States*, 6 Cir., 1953, 204 F.2d 834, 839; *cf. Audett* v. *United States*, 9 Cir., 1959, 265 F.2d 837, 848, *cert. den.*, 361 U.S. 815. Here we do not see even that danger.

Judgment will enter affirming the order of the District Court denying the motion.

[fol. 33] IN UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

• • • •

JUDGMENT—January 20, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was submitted on briefs and record appendices,*

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD, Clerk.

By /s/ DANA H. GALLUP
Chief Deputy Clerk

Approved:

/s/ PETER WOODBURY
Chief Judge.

• • • •

[fol. 34] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 35] SUPREME COURT OF THE UNITED STATES

No. 712 Misc., October Term, 1959

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the First Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 27, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1039 and consolidated for argument with No. 870. A total of two hours is allowed for the argument of these cases.

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FILE COPY

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 70

No. 179

THEODORE GREEN,

Petitioner,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

JAMES VORENBERG,
50 Federal Street,
Boston, Massachusetts.

Attorney for Petitioner

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UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the Court of Appeals in No. 70 (R. 34),[1] affirming the judgment of the United States District Court for the District of Massachusetts is reported in 273 F.2d 216. The opinion of the District Court (R. 28) denying the petitioner's motion to vacate sentence under FED. R. CRIM. P. Rule 35 is reported at 24 F.R.D. 130.

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[1] There are separate Transcripts Record in this Court for No. 70 and No. 179, Except where the context makes such specification unnecessary, references to the Transcripts will specify whether the Transcript in No. 70 or No. 179 is referred to.

The opinion of the Court of Appeals in No. 179 (R. 26) affirming the order of the United States District Court is reported at 274 F.2d 59. The memorandum of the District Court (R. 2) denying the motion for correction of sentence under FED. R. CRIM. P. Rule 35 is unreported.

Jurisdiction

The judgment of the Court of Appeals in No. 70 was entered December 8, 1959 (R. 37). The order granting the motion for leave to proceed *in forma pauperis* and granting the petition for a writ of certiorari was granted on April 18, 1960.

The judgment of the Court of Appeals in No. 179 was entered on January 20, 1960. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari were granted on June 27, 1960.

The jurisdiction of this Court in both cases rests on 28 U.S.C. § 1254(1).

Statute and Rules Involved

The principal statute and rules involved are 18 U.S.C. § 2113 and FEDERAL RULES OF CRIMINAL PROCEDURE Rules 32(a) and 35, which are set out in the Appendix hereto (pp. 39-41). Form 25 of the Appendix to said Rules also is set out in the Appendix hereto (pp. 42-43).

Questions Presented

No. 70

1. Whether FED. R. CRIM. P. Rule 32(a) requires that a sentence be vacated because of the trial judge's failure

to ask the defendant if he had anything to say in his own behalf prior to sentencing.

No. 179

2. Whether a sentence of twenty-five years for aggravated bank robbery is illegal and should be vacated under FED. R. CRIM. P. Rule 35, when prior to imposing it the trial court had already imposed a twenty-year sentence under another count of the indictment charging the same offense without the elements of aggravation specified in 18 U.S.C. § 2113(d).

3. Whether the words "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device," in 18 U.S.C. § 2113(d) require a finding of objective peril or danger as a prerequisite to the imposition of the twenty-five year sentence therein provided.

4. Whether a sentence of twenty-five years for aggravated bank robbery as provided for in 18 U.S.C. § 2113(d) is illegal and should be corrected under FED. R. CRIM. P. Rule 35 by reducing it to the twenty-year maximum specified in 18 U.S.C. § 2113(a) for unaggravated bank robbery, where the conviction for the aggravated offense was returned in response to instructions which did not require the jury to find the elements of aggravation specified in 18 U.S.C. § 2113(d).

Statement of the Case

The petitioner together with two others was tried by jury in the Federal District Court for Massachusetts on his plea of not guilty to a three count indictment charging that the defendants did: (1) enter a bank with intent to commit a felony in violation of 18 U.S.C. § 2113(a); (2) rob

the bank, also in violation of 18 U.S.C. § 2113(a); and (3) in committing the robbery, assault and put in jeopardy the lives of certain persons by the use of a dangerous weapon or device, in violation of 18 U.S.C. § 2113(d). One of the defendants entered a plea of guilty and became a prosecution witness.

In the trial judge's charge to the jury he made several statements with respect to what was required to be found to convict under Count 3. The substance of these statements, which are set forth verbatim on pages 31-32 below, was that the defendants should be convicted under Count 3 if the jury found that they committed the robbery by the use of a dangerous weapon; or that in the course of the robbery they put persons in fear by the use of a dangerous weapon. In one reference to Count 3 the trial judge instructed the jury that there was no contention that the robbery had not been committed in an aggravated manner; and, apparently still referring to that count, that the issue was whether the defendants were the persons who robbed the bank.

Both defendants who stood trial were convicted on all three counts.

The sentencing of the defendants came at the end of a hearing in which arguments and rulings on a motion in arrest of judgment and a motion for a new trial were interspersed with statements by counsel and the judge concerning sentencing. The judge's statement explaining his attitude in imposing sentence concluded as follows (No. 70, R. 22-23):

> "They deserve no consideration. They are what I call mad men. The only protection society has got is to wall them off, fence them off from society just as long as the Court is able to do it. There isn't one

word that can be said in their defense. There is not one word that can be said, I think properly, that would warrant a Court in believing these men could be rehabilitated.

"Their records date back for the years almost without end—30 years back as far as Jacobanis is concerned—1923, and the record of Green goes back to 1931. Serious crimes: Robbery, larceny, breaking and entering, use of guns all over their entire careers.

"Mr. Clerk—"

The court and clerk conferred. Then the clerk announced Jacobanis' sentence and announced Green's sentence as follows (No. 70, R. 23):

"Theodore Green, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment that you be imprisoned for 20 years, and on Count 3 of the indictment that you be imprisoned for the period of 25 years, said prison sentence to run concurrent and to begin upon your release from prison upon the sentence you are now receiving under order of the State Court."

At no time did the trial judge ask either defendant if he wished to speak in his own behalf; nor did he say anything which indicated that he was ready or willing to hear from either defendant personally. An instrument was executed by the trial judge and the Clerk in the form set forth as Form 25 following the FEDERAL RULES OF CRIMINAL PROCEDURE containing the following statement:

". . . and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary

being shown or appearing to the Court. . . ." (No. 70, R. 24).

No. 70 originated with a motion by the petitioner *pro se* to vacate sentence under FED. R. CRIM. P. Rule 35 on three grounds, the third of which was that the judge did not afford the petitioner an opportunity to speak before imposition of the sentence as required by FED. R. CRIM. P. Rule 32(a). This motion was denied by the district court for the District of Massachusetts in an opinion dated June 15, 1959, 24 F.R.D. 130 (R. 28), reasoning with respect to the third ground that where the court listened to counsel, and there was no indication that it was not prepared to listen to the defendant himself, the defendant had been afforded the opportunity to speak, and further that the petitioner had not shown that if he had been offered the opportunity to speak in person he would have added anything to what his counsel already had said. The district court's judgment was affirmed by the court of appeals on December 8, 1959 with an opinion holding that FED. R. CRIM. P. Rule 32(a) does not require "personal solicitation of a defendant to speak in his own behalf when he is represented by competent and experienced counsel of his own choice" who has spoken at length for his client in mitigation of punishment, 273 F.2d 216 (R. 34). On April 18, 1960, this Court granted the petitioner's motion for leave to proceed *in forma pauperis* and petition for writ of certiorari, but limited the grant to the single question "[w]hether the judgment was invalidated where the court did not offer the petitioner an opportunity to speak before sentence was imposed".

No. 179 originated with a separate motion by petitioner *pro se* to correct sentence pursuant to FED. R. CRIM. P. Rule 35 on two grounds: first, that when the court imposed a 20-year sentence on Count 1 it exhausted its power, and

the 25-year sentence on Count 3 was therefore invalid; and second, that the sentence on Count 3 was invalid because the jury was not properly instructed, and no verdict was returned which required a finding of the facts specified in 18 U.S.C. § 2113(d) to support a 25-year sentence. The district court denied the motion in a memorandum dated October 15, 1959 (R. 2) holding that the sentences on the three counts were imposed simultaneously and the petitioner was not entitled to have the longest sentence set aside, and that the argument regarding the propriety of instructions to the jury could not be raised by motion under FED. R. CRIM. P. Rule 35 and was without merit in any case. This decision was affirmed by the court of appeals in an opinion dated January 20, 1960, 274 F.2d 59 (R. 26). This Court granted petitioner's motion to proceed *in forma pauperis* and his petition for writ of certiorari on June 27, 1960 (R. 30).

Summary of Argument

No. 70

Rule 32(a) requires that the judge specifically ask the defendant if he has anything to say in his own behalf prior to sentencing, whether or not the defendant is represented by counsel. This right to speak prior to the imposition of judgment, known as the *allocutus*, had its origin in the early common law, and the essence of that right has always been the specific offer by the court of an opportunity to speak. Rule 32(a) is designed to continue that right in the federal courts without diminution. The words "in his own behalf" in the rule confirm that a statement by counsel is no substitute for a statement by the defendant himself; and the language of Form 25 in the Appendix to the Rules confirms that the duty of a trial judge to make

affirmative inquiry of the defendant is to be continued under the Rules.

While present criminal practice provides other opportunities for the presentation of legal defenses which would ordinarily have been asserted through the *allocutus* at early common law, modern concepts relating to criminal sentences make a personal statement by the defendant prior to sentencing peculiarly significant. It is the trial judge's duty to try to make some evaluation of the character of the accused as a basis for determining sentence and in this connection he should make an effort to hear the defendant speak for himself. The failure to offer the opportunity to speak denies the defendant an historic and important right and requires that the case be remanded for resentencing.

No. 179

Counts 2 and 3 clearly refer to but one offense—bank robbery. It is quite apparent that only one sentence may legally be imposed for this single offense. Therefore after imposing a 20-year sentence on Count 2 the trial judge had no power to impose a 25-year sentence for the same offense on Count 3 and the latter offense should be vacated. The imposition of multiple sentences for a single offense is at best a slipshod procedure which shows that the trial judge had an erroneous view of the law at the time of sentencing. At the very least, therefore, the multiple and contradictory sentences for a single offense should be vacated and the case returned to the district court with directions to impose a single sentence.

The essence of the aggravation which under 18 U.S.C. § 2113(d) authorizes an increase in the maxi-

mum sentence for bank robbery from 20 to 25 years, is the use of a dangerous weapon in such a manner as to create an objective state of peril and danger. The trial judge in this case authorized the jury to convict under Count 3 if, in the course of robbery, persons were put in *fear* by the use of a dangerous weapon. In view of this statement and his subsequent erroneous statement indicating that aggravation was not in issue, the effect of the charge was to make the petitioner's conviction on Count 3 simply another conviction of unaggravated bank robbery, for which the maximum permissible sentence was 20 years. Since the defendant does not seek to upset his conviction but only to bring his sentence into conformity with the statute for the offense of which he was actually convicted, relief under FED. R. CRIM. P. Rule 35 is appropriate.

ARGUMENT

I (No. 70)

The Sentences Imposed Upon Petitioner Are Illegal and Should Be Vacated Because of the Trial Judge's Failure to Ask the Petitioner if He Had Anything to Say Prior to Sentence in Accordance With Rule 32(a) of the Federal Rules of Criminal Procedure.

The last sentence of Rule 32(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE reads as follows:

> "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

In the instant case the trial court did not ask the petitioner if he had anything to say in his own behalf before sentencing, although counsel for the petitioner did speak briefly on the question of sentence. The petitioner believes that the quoted language of Rule 32(a) has not been complied with. He contends therefore that the sentence imposed upon him should be set aside and that he should be brought before the district court for resentencing, at which time he should be afforded an opportunity personally to speak in his own behalf before sentence is pronounced.

A. *The Right of Allocution Embodied in Rule 32(a) Requires That the Trial Judge Ask the Defendant if He Has Anything to Say Before Sentence Is Pronounced.*

The right of the defendant to speak to the court prior to imposition of sentence—known in the common law as the *allocutus* or allocution—has been a fundamental right of the accused since the early days of the common law. At the end of the 17th Century it was already recognized that the court's failure to ask the accused if he had anything to say before sentence was imposed required reversal. See *Anonymous*, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B. 1689) ("and it does not appear that the party was asked what he could say why sentence of death shall not be spoken . . . Attainder reversed"); *Rex* v. *Geary*, 2 Salk. 630, 91 Eng. Rep. 532 (K.B. 1689); *King* v. *Speke*, 3 Salk. 358, 91 Eng. Rep. 872 (K.B. 1689). See also *Earl of Leicester* v. *Heyden*, 1 Plow. 384, 387, 75 Eng. Rep. 582 (K.B. 1571), referring to offering accused opportunity to speak in a case in 1554.

Chitty has described the *allocutus* in the following terms:

> "It is now indispensibly necessary, even in clergyable felonies, that the defendant should be asked by the clerk if he has anything to say why judgment of

death should not be pronounced on him; and it is material that this appear upon the record to have been done; and its omission after judgment in high treason will be a sufficient ground for the reversal of the attainder. On this occasion, he may allege any ground in arrest of judgment; or may plead a pardon if he has obtained one, for it will still have the same consequences which it would have produced before conviction, the stopping of the attainder. If he has nothing to urge in bar, he frequently addresses the court in mitigation of his conduct, and desires their intercession with the king or casts himself upon their mercy." 1 CHITTY, CRIMINAL LAW 700 (1816).

See also 4 BLACKSTONE, COMMENTARIES 375 (Lewis ed. 1897).

From early English cases, the right of allocution follows a clear course into American law. See *Ball* v. *United States*, 140 U.S. 118, 131, where this Court stated that the great weight of authority in this country was that a judgment and sentence must be set aside if the defendant has not been asked if there was any reason why sentence should not be pronounced. See also *Schwab* v. *Berggren*, 143 U.S. 442; *People* v. *Nesce*, 201 N.Y. 111, 113, 94 N.E. 655, 656 (1911):

"It has been one of the indispensable requirements of the common law that no person should have the sentence of death passed against him without first being given the opportunity to personally speak for himself and show cause, if he can, why sentence should not be pronounced against him. This right has been jealously guarded from very ancient times."

The *allocutus* originated at a time when most crimes were capital felonies and the accused did not have the right

to counsel or even the right to address the court prior to conviction. See 1 STEPHEN, HISTORY OF CRIMINAL LAW IN ENGLAND, 304 (1883). However, such a right in some form has continued to exist in modern times in most of the states, and in many instances is applicable to noncapital crimes. 2 BISHOP, CRIMINAL PROCEDURE § 1293 (2d ed. 1913); ALI CODE OF CRIMINAL PROCEDURE, Commentary on § 389 (Official Draft 1931); Barrett, *Allocution*, 9 Mo. L. Rev. 115 & 232 (1944).

Since its earliest appearance in the common law, the essence of the *allocutus* has been the putting of the question by the judge. The obvious reason for this is that unless it is clear that the judge has asked the defendant if he wishes to be heard, there is no way of determining with certainty that an effective opportunity to address the court has been granted. It has therefore been deemed a necessary incident of this right that the record show that the question was put to the accused by the judge. *Rex* v. *Geary*, 2 Salk. 630, 91 Eng. Rep. 532 (K.B. 1689); *Ball* v. *United States*, 140 U.S. 118, 130; 2 BISHOP, CRIMINAL PROCEDURE § 1358 (2d ed. 1913); *Gadsden* v. *United States*, 223 F.2d 627, 632 (D.C. Cir. 1955); *Graham* v. *People*, 63 Barb. 468, 478-479 (N.Y. Sup. Ct. 1872):

> "... it is not sufficient that the records of the court show a conviction and sentence. It is not to be presumed from these, that the practice of asking the prisoner, before sentence, what he had to say, etc., has been complied with, but it is necessary that a compliance with the prerequisite to the validity of the sentence should be made expressly to appear, on a writ of error, by a distinct statement in the record of the court below."

It is perfectly clear that the Advisory Committee which proposed the FEDERAL RULES OF CRIMINAL PROCEDURE in-

tended to preserve as a right the traditional *allocutus*, although broadened by the express language of Rules 1 and 2 so as to apply to all crimes whether felonies or misdemeanors and regardless of available punishment. See Comments on Proposed Rule 30(a), *Report of the Advisory Committee on Federal Rules of Criminal Procedure, Preliminary Draft*, p. 183, March, 1943. One member of the Advisory Committee has explained Rule 32(a) as follows: "The requirement of this Rule 32(a) for sentence 'without unreasonable delay' and with opportunity to the defendant to make a statement before sentence accords with IV Bl. Comm. 375" (the reference being to Blackstone's description of the *allocutus*). Longsdorf, *Beginnings and Background of Federal Criminal Procedure*, 4 BARRON, FEDERAL PRACTICE AND PROCEDURE 53 (1951).

There is not the slightest indication in the background or language of Rule 32(a) that there was any intention to depart from the historic procedure of the court's putting a simple and specific question to the defendant. Furthermore, the language of the suggested Judgment and Commitment Form (Form 25) adopted as part of the Appendix to the Rules, shows clearly the procedure which Rule 32(a) envisioned. That form which is to be signed by the judge after sentencing includes the following recital:

> "... and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court...."

This recital is completely consistent with common law *allocutus*.[2] It makes it perfectly clear that the courts are

[2] Compare the language of Form 25 with that used in *King* v. *Speke*, 3 Salk. 358, 91 Eng. Rep. 872 (K.B. 1689) (attainder reversed because accused was not asked "what he had to say for himself, why judgment should not be given").

to "afford . . . an opportunity" under Rule 32(a) by *asking* the defendant if he has anything to say on his own behalf. That the Forms are not mandatory (see FED. R. CRIM. P. Rule 58) does not detract from their usefulness as a guide to interpretation. Form 25 was adopted at the same time as Rule 32(a) and they could not have been intended to have conflicting meanings.

See also 12 CYCLOPEDIA OF FEDERAL PROCEDURE § 50.16 (3d ed. 1952):

> "Under the Rule, the trial judge is required to afford the defendant an opportunity to make a statement, and the judge should ask the defendant whether he desires to make one."

The courts of appeal which have considered whether Rule 32(a) makes it mandatory that the trial judge ask the defendant if he has anything to say before sentencing have reached varying results. The Court of Appeals for the District of Columbia sitting *en banc* has ruled, in a decision which it held was to be given prospective effect only, that the trial court must specifically ask the defendant if he has anything to say. *Couch* v. *United States*, 235 F.2d 519 (D.C. Cir. 1956). See also *Howard* v. *United States*, 247 F.2d 537 (D.C. Cir. 1957), *summarily rev'd and remanded*, 356 U.S. 25; *Hudson* v. *United States*, 229 F.2d 36 (D.C. Cir. 1956); *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955); *Jenkins* v. *United States*, 249 F.2d 105 (D.C. Cir. 1957). The Court of Appeals for the Sixth Circuit held in *Sandroff* v. *United States*, 174 F.2d 1014, 1020 (6th Cir. 1949), *cert. denied*, 358 U.S. 947, that the question, "Anything further?" sufficed to afford the opportunity to be heard, apparently on the implicit premise that a failure by the trial judge to make some inquiry would not have complied with the Rule. The Courts of

Appeal for the Tenth Circuit in *Calvaresi* v. *United States*, 216 F.2d 891, 901 (10th Cir. 1954), *rev'd summarily*, 348 U.S. 961, and the First Circuit in the instant case have held that Rule 32(a) does not impose an affirmative duty on the judge to ask the defendant if he wishes to speak. The court below in the instant case indicated, however, that it thought the putting of an affirmative question would be better practice. In *Mixon* v. *United States*, 214 F.2d 364 (5th Cir. 1954), the court held that the defendant waived his right to object to the judge's failure to ask the question by not taking an appeal.

The federal decisions which have concluded that the trial judge need not put an affirmative question to the defendant appear to be based on the notion that where counsel speaks and the defendant does not, the defendant has waived the right and it will be assumed that he had nothing he wished to say. See, *e.g.*, opinion below (No. 70, R. 34-36). But the right of allocution is the right to be invited to speak; by its nature, it cannot be waived by silence. Thus, the New York courts in construing § 480 of the NEW YORK CODE OF CRIMINAL PROCEDURE, to which the comments of the Advisory Committee on the Criminal Rules refer, see *supra*, p. 13, have consistently held that the putting of the question is "mandatory" and cannot be waived. See, *e.g.*, *People* v. *Martin*, 1 N.Y. 2d 406, 135 N.E. 2d 711 (1956). Accord *State* v. *Ausberry*, 83 Ohio App. 514, 82 N.E. 2d 751 (1948).

In view of the nature of the issues involved in sentencing, a statement by counsel on the defendant's behalf is no substitute for a personal statement by the defendant himself. On its face the last sentence of Rule 32(a) seems perfectly clear that the right which it grants is personal to the defendant. Had it been intended that a statement by counsel would be a substitute for the defendant's right

to speak himself the words "in his own behalf" would be superfluous and misleading. These words seem ideally suited to describe the situation where a defendant's counsel may speak on his client's behalf, and then the defendant himself is offered a chance to speak in his "own" behalf.

The use of the word "defendant" elsewhere in the Rules where context and normal trial practice make it clear that the particular action described may be taken by counsel is irrelevant.[3] The language of Rule 32(a) and Form 25, particularly as viewed against the historical background of the *allocutus*, clearly look to a personal right. Indeed, it would do no less violence to common sense and the normal meaning of words to read out of Rule 32(a) the words "in his own behalf" than it would to interpret Rule 43, requiring that "the defendant shall be present", as permitting his presence through counsel, which clearly it does not. See *Crowe* v. *United States*, 200 F.2d 526 (6th Cir. 1952). See also *Lewis* v. *United States*, 146 U.S. 370.

B. *The Duty of the Judge to Invite the Defendant to Speak Before Sentencing Is of Particular Importance in View of the Judge's Broad Discretion in Sentencing.*

The accused's right to address the court before sentence is imposed assumes special significance in the light of present views concerning punishment for crime. The *allocutus* is less significant now than in times past as an opportunity to present such pleas as wrong identity, receipt of a pardon, insanity and pregnancy. But the broadened discretion of the judge in sentencing and the recognition

[3] E.g. Rule 7(d): "The court on motion of the defendant may strike surplusage from the indictment or information;" Rule 16 providing for an order permitting inspection of books, etc. "upon motion of a defendant".

that the nature of the crime should not be the sole factor in determining punishment make it essential that the judge make an evaluation of the accused, the forces that led him to crime and the likelihood of his rehabilitation.

In imposing sentence, the judge abandons his role as an essentially passive arbitrator between the parties within the relatively clear limits of trial procedure. Rules of evidence are discarded in the interest of bringing before the judge whatever may bear on his evaluation of the character and personality of the defendant and his prediction or educated guess as to the likelihood of rehabilitation. And this Court has held that he need not disclose to the defendant or his counsel either the sources or the substance of information relied on. *Williams* v. *New York*, 337 U.S. 241, *petitions for rehearing denied*, 337 U.S. 961, 338 U.S. 841.[4]

If the trial judge is not to be limited in his sources of information, it is corollary to this that he has a *duty* to consider with an open mind whatever may be available to shed light on his decision. Surely he ought not to be slipshod, as was the judge in this case, in seeking such insight as a statement from the defendant might provide. It is not contended that the *allocutus* should be the sole or dominant basis for determining punishment or that it will always prove useful. Undoubtedly, in many cases the defendant will decline even an explicit invitation to speak—or if he does speak will offer nothing significant. But there will be cases where what the defendant says will raise questions in the judge's mind concerning material in the presentence report or put that material into a different

[4] This Court rejected the suggestion of the Advisory Committee on the Criminal Rules which would have made the presentence report available both to the prosecution and the defense. Compare Rule 34(c)(2), *Report of the Advisory Committee on the Federal Rules of Criminal Procedure* (1944), with Rule 32(c) as promulgated by the Court and now in effect.

perspective. Furthermore, what the judge hears may add a new dimension to his judgment of the character of the accused. It has been recognized that an opportunity to observe and hear the accused is an important element in making a comprehensive evaluation. See, *e.g.*, Hayner, *Sentencing by an Administrative Board*, 23 Law and Contemp. Prob. 477 (1958).[5] Cf. Allport, *The Trend in Motivational Theory*, 23 Am. Jour. of Orthopsychiatry 107, 112 (1953) ("To ask a man his motives, however, is not the only type of 'direct' method we may employ. It is, however, a good one—especially to start with".) In over 85% of Federal criminal cases the defendant pleads guilty. *Hearings on Federal Sentencing Procedure Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess. 30 (1958). And in many of those that go to trial, the defendant does not testify. Thus, without a statement before sentencing the judge may have no opportunity at all to hear the defendant speak.

The right to speak on the subject of sentence is the defendant's last opportunity to soften his punishment. Contrary to what the court below suggested (see last sentence of opinion, No. 70, R. 36), the observance of this right should not turn on whether or not it is likely that what the accused has to say will influence the judge in any particular case, any more than the right to a fair trial turns on the statistical probability of acquittal.

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[5] In describing both the pitfalls and advantage of an interview as the basis for determining appropriate sentence, this author states (p. 490):

"Another aspect of Board hearings to remember is that prisoners have time. Many of them use this time thinking about the personality of the Board and figuring out what 'line' would be most effective. The more intelligent may try their best to 'con' the Board. . . . One should not be too critical, however. It is better to be 'conned' occasionally than to discourage a man with an honest story."

In view of the sentencing court's sweeping power it is essential that there be punctilious observance of such procedural protections as the law affords the defendant. See *Townsend* v. *Burke*, 334 U.S. 736. The language of this Court in *Vitarelli* v. *Seaton*, 359 U.S. 535, 540, relating to administrative proceedings, is in many respects applicable here:

> "For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and when it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a case being tried in a court of law before trained judges, scrupulous observance of departmental procedural safeguards is clearly of particular importance." See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88-89.

In sentencing, where human life and liberty are involved, where the discretion of the tribunal is broader and where the granting of full procedural rights imposes no significant burden, an even stronger case exists in fundamental justice for insisting on full compliance with such rights.

In view of the purpose of the *allocutus*, it is obvious that an opportunity for the defendant's counsel to make a statement concerning sentence is no substitute for the judge's putting the question directly to the defendant. Even the most thorough and careful lawyer is unlikely to have learned everything which may be relevant to his client's background and character. Statements may be made by the prosecuting attorney or the judge during the presentencing hearing relating to matters completely unknown to counsel and ordinarily counsel will not have seen the

probation officer's report. And obviously as a practical matter the extent to which counsel can effectively exercise the defendant's right of allocution will be further limited where, as in more than 25% of federal criminal cases last year, counsel has been appointed by the court. See *Report of the Administrative Office of the United States Courts*, Table D 5, 239-240 (1959). See *Couch* v. *United States*, 235 F.2d 519 (D.C. Cir. 1956). It thus seems both unrealistic and unfair to hold that the granting of an opportunity to a defendant's counsel to address the court complies with Rule 32(a).

In addition to the background, text and purpose of the Rules, there is an obvious practical reason why the trial court should affirmatively offer the accused an opportunity to address the court. In many cases the defendant will be most reluctant at the critical moment of sentence to risk incurring the judge's annoyance by interjecting an unsolicited statement. And whether the risk is real or imagined is not what matters for these purposes. In either event, its deterrent effect—particularly on defendants not yet hardened to criminal trials or not prone to speech-making—is obvious. Thus, to shift from the trial judge the burden of securing to the defendant the "opportunity" to make a statement, is for many defendants to deprive them of the opportunity. As one federal judge has said:

> "After being convicted, the defendant is usually so crushed as to hestitate to make demands lest they bring increased punishment. The rule contemplates no such demand, and clearly without the necessity of any demand at that stage of the trial, the defendant's legal rights should be accorded to him by the court." Rives, J. concurring specially in *Mixon* v. *United States*, 214 F.2d 364, 366 (5th Cir. 1954). Cf. *Hibdon* v. *United States*, 204 F.2d 834, 839 (6th Cir. 1953).

That it is difficult enough to get defendants to exercise their right to be heard when it is specifically offered to them, without requiring them to intrude themselves uninvited into the proceedings, is borne out by recent testimony of another federal judge describing his conduct of the sentencing portion of the trial:

> "I listened to what the United States Attorney had to say, and then I listened to what the various counsel for the defendants had to say. Then of course, I listened to the defendants, but it is very difficult to get them to say anything." Testimony of Biggs, J., *Hearing on Federal Sentencing Procedure Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess. 23 (1958).

The proceedings before the sentencing judge in the instant case exemplify the defendant's dilemma and the wisdom of requiring that the judge affirmatively ask the defendant if he wishes to speak. After the prosecuting officer and respective counsel for the defendants had spoken briefly, the judge made a statement bitterly critical of the defendants in which he indicated the basis for his imposing the maximum available sentence (No. 70, R. 22-23). In the course of this statement he said, "They deserve no consideration . . . There isn't one word that can be said in their defense"—hardly an invitation to the petitioner to speak in his own behalf. After the judge's statement and without any pause in the proceedings sentence was pronounced. It would have taken a stout-hearted, perhaps foolhardy, defendant to interrupt the judge at this stage. Since there was no indication prior to the actual pronouncement of sentence that the judge would be willing to hear from the defendant—or even any basis on which the defendant or his counsel could determine *when* he should speak if he dared to do so—it is impossible to select any

point in the proceedings at which it can fairly be said that the petitioner was "afforded the opportunity" to speak.*

The trial judge showed his total lack of concern with the petitioner's rights under Rule 32(a) by signing a Judgment and Commitment Form reciting that he had "asked the defendant whether he has anything to say why judgment should not be pronounced" (No. 70, R. 24-25). The record is clear, and the Government conceded in its brief in the court below, that no such question was ever asked.

As shown above, there are compelling reasons in fairness and in history and on the basis of a sound reading of Rule 32(a) itself for this Court to hold that the Rule requires that the trial judge ask the defendant if he has anything to say before sentence is pronounced. The asking of the question imposes no significant burden on the court and no special form of words is required. Where the question has not been asked a new trial is not required to secure the defendant's right to address the court. What is necessary is to remand for resentencing and to instruct the trial judge to ask the petitioner if he wishes to be heard. It is urged that the failure to comply with Rule 32(a) invalidates the

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* The difficulty which the defendant would have had in knowing *when* to speak was aggravated in this case by the highly confusing chronological progression of the proceeding culminating in sentence, as is shown by the following outline (page references are to Record in No. 70):

1. Argument on motion in arrest of judgment (R. 4-8).
2. Motion in arrest of judgment and motion for new trial denied (R. 8).
3. U. S. Attorney's statement on sentence (R. 8-10).
4. Argument on motion for new trial (R. 10-18).
5. Statement by Green's counsel re sentence (R. 18-19).
6. Statement by Jacobanis' counsel re sentence (R. 19-20).
7. Statement by court denying motion for new trial (R. 21-22).
8. Statement by court on sentence and imposition of sentence (R. 22-23).

sentence and makes the relief sought here pursuant to Rule 35 appropriate. It is further urged that in fairness the trial court should be instructed that in imposing the new sentence it should give credit for that portion of the sentence which the petitioner has already served and that for purposes of parole and good-time credits the new sentence should be deemed to run from the date of the original sentences. See pp. 36-37, *infra*.

II (No. 179)

The Twenty Five Year Sentence on Count 3 Was Illegal and Should Be Vacated Under Fed. R. Crim. P. Rule 35.

In No. 179 petitioner has moved the district court under FED. R. CRIM. P. RULE 35 to correct an illegal sentence by vacating the 25-year sentence on Count 3. The first ground for the motion is that the sentence on Count 3 is illegal, because the court had already exhausted its power to impose sentence. The second ground is that because of the way in which the issue was put to the jury, the conviction under Count 3 would authorize only a 20-year sentence in any event.

A. *Imposition of a Twenty-Five Year Sentence on Count 3 Was Illegal Because the Trial Court Had Exhausted Its Power to Sentence.*

It is clear that Counts 2 and 3 of the indictment in this case charged petitioner with only one offense. 18 U.S.C. § 2113(d) provides that "whoever, *in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section*, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be . . . imprisoned not more than twenty-five years". (Emphasis supplied.) Thus §2113(d)

does not create an additional offense but only increases the maximum punishment which may be imposed for any of the offenses defined in §2113 if they are committed in the aggravated manner. The Government has conceded as much. See *Holiday* v. *Johnston*, 313 U.S. 342, 349. See also *Peeler* v. *United States*, 163 F.2d 823, 824 (10th Cir. 1947); Annotation, 59 A.L.R. 2d 946, 992-994 (1958). Since Counts 2 and 3 charged only a single offense and the offense could only be punished once, the imposition of separate sentences on Counts 2 and 3 was erroneous and illegal.[7]

When two sentences are imposed for one offense, either sentence standing alone being a lawful sentence, petitioner submits that the first sentence imposed should stand, and that any attempt thereafter to impose another sentence

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[7] In his original motion under Rule 35 and in his petition for certiorari, petitioner took the position that the trial court's power to sentence was exhausted on imposition of the 20-year sentence under Count 1. In *Prince* v. *United States*, 352 U.S. 322, this Court held that consecutive sentences could not be imposed for entering a bank with intent to rob it and for consummation of the robbery. The language in that case suggests that entry with intent to rob is merged in the robbery when consummated and that for sentencing purposes the entry and robbery constitute but one offense. 352 U.S. at 328. However, the point need not be labored here, because it is clear on any theory that Counts 2 and 3 charge but one offense, and the twenty-five year sentence is equally void whether the trial court exhausted its power upon imposition of sentence with respect to Count 1 or Count 2.

Prince has been read by some courts as indicating that a charge of bank robbery under §2113(a) is merged in another count charging that the offense was committed in the aggravated manner specified in §2113(d). But §2113(d) does not specify a separate offense into which a robbery laid under §2113(a) can be said to merge. In any event the merger theory has only to do with the number of offenses for which sentence may legally be imposed and is not useful in choosing which of two sentences should stand when only one was authorized. Compare *United States* v. *DiCanio*, 245 F.2d 713 (2d Cir. 1957), *cert. denied*, 355 U.S. 874, with *United States* v. *Leather*, 271 F.2d 80 (7th Cir. 1959), *cert. denied*, 363 U.S. 831.

should be considered and declared to be void. The trial court has power to impose only one sentence. When a legal sentence is imposed the court's power is exhausted. Its only remaining power is the power under FED. R. CRIM. P. Rule 35 to reduce the sentence imposed; it has no power to impose a second sentence or to increase the sentence legally imposed. In *Holbrook* v. *Hunter*, 149 F.2d 230, 232 (10th Cir. 1945), the court said: "[T]he most that can be said is that when the court imposed the sentence of 20 years on Count 1, it exhausted its power to sentence, and the sentence on Count 2 was void." And while that was a case where the longer sentence was imposed first, it hardly seems appropriate to apply the exhaustion doctrine only where it happens to produce the most severe sentence. See *United States* v. *Sims*, 72 F. Supp. 631 (W. D. Mo. 1946). A holding that the first legal sentence shall prevail and that any subsequent sentence attempted to be imposed for the same offense is void provides a straightforward rule by which the confusion which has surrounded multiple sentencing for offenses under 18 U.S.C. § 2113 can be eliminated. In any event, it would be more consistent with the doctrine of lenity to hold here that where multiple sentences are improper, but one standing alone would be authorized, the shortest should prevail. Cf., *e.g.*, *Heflin* v. *United States*, 358 U.S. 415, 419; *Bell* v. *United States*, 349 U.S. 81.

While a litigant may have to suffer the consequences of errors of law which he or his counsel make, extra hardship should not be inflicted upon him as a result of the error of the trial court in imposing multiple sentences. For, as noted below, simply to affirm the longest sentence imposed is to guess at what the trial judge would have done had he known there was only one offense. And sending the case back for resentencing, unless correction is made *nunc pro tunc*, will be prejudicial to the defendant in computation of the time when he will be eligible for parole, even if credit is given

for time already served. See 18 U.S.C. §4202; *Howell* v. *United States*, 103 F. Supp. 714 (D.C. W. Va. S.D. 1952), *aff'd per curiam*, 199 F.2d 366 (4th Cir. 1952); *United States* v. *Patterson*, 29 Fed. 775 (C.C. N.J. 1887) (opinion of Mr. Justice Bradley). Therefore, and particularly in view of the prejudicial effect of the trial judge's charge to the jury (see Part B, *infra*), the Court "in the exercise of its supervisory power over the administration of justice in the lower federal courts" (*Yates* v. *United States*, 356 U.S. 363, 366-67; *McNabb* v. *United States*, 318 U.S. 332), should hold that the trial judge was limited to the imposition of the first legally sufficient sentence uttered and that his power to sentence this defendant was thereupon exhausted.

At the very least, in view of the confusion inherent in the imposition of inconsistent sentences for a single offense, the case should be returned to the district court to impose a single sentence for the offense of which petitioner was convicted. Simply to affirm the longest sentence imposed as did the court below is to act upon speculation as to what the trial judge would have done. Such a holding would be inconsistent with the strict requirements of certainty and fairness in sentencing matters which have always been recognized by this Court. See, *e.g.*, *Townsend* v. *Burke*, 334 U.S. 736; *Nilva* v. *United States*, 352 U.S. 385; *Husty* v. *United States*, 282 U.S. 694.

This Court's decision in *Yates* v. *United States*, 355 U.S. 66, is directly in point. In that case, the Court concluded that eleven refusals to answer questions, for which the trial judge had imposed eleven one-year contempt sentences to run concurrently, constituted only a single punishable offense. Had the Court employed the reasoning of the court below in the instant case, it would have characterized the error as "technical" and affirmed the one-year sentence. Instead, the Court remanded for resentencing noting that:

"While the sentences imposed were concurrent, it may be that the court's judgment as to the proper penalty was affected by the view that petitioner had committed 11 separate contempts." 355 U.S. at 75.

See also *United States* v. *Hines*, 256 F.2d 561 (2d Cir. 1958).

Similarly in the instant case the sentencing judge may have been influenced in choosing a 25-year sentence by its error in believing that there were three separate offenses to be considered in sentencing. See *Yasui* v. *United States*, 320 U.S. 115, 117; *Nilva* v. *United States*, 352 U.S. 385, 396. It is unfair to the petitioner to assume that the judge would have imposed the same 25-year sentence had he known he could impose only one sentence; just as it would be unfair to the Government to assume that the judge would have imposed either one-third or 25/65ths of the maximum allowable sentence of 25 years had he been correct on the law. The appellate courts are simply not in a position to know what was in the trial judge's mind and they "should not be called upon to speculate." *Simunov* v. *United States*, 162 F.2d 314, 315 (6th Cir. 1947). Therefore, the case should, at least, be remanded for resentencing.

It should also be noted that the assumption of the court below that the petitioner would not be affected by the "technical" error of multiple concurrent sentences is incorrect. It seems clear, for instance, that even where a number of concurrent sentences relate to the same transaction, the opportunity for parole may be adversely affected. See *United States* v. *Hines*, *supra*, at p. 563; *Audett* v. *United States*, 265 F.2d 837, 848 (9th Cir. 1959), *cert. denied*, 361 U.S. 815, *petition for rehearing denied*, 361 U.S. 926; *Hibdon* v. *United States*, 204 F.2d 834, 839 (6th Cir. 1953).

B. *The Trial Judge's Charge to the Jury on Count 3 Failed to Define the Aggravated Form of Bank Robbery Specified in 18 U.S.C. Section 2113(d) and Therefore the Conviction Amounted Only to Another Conviction for Unaggravated Bank Robbery for Which the Maximum Sentence Is 20 Years.*

The trial judge's charge to the jury did not define the aggravated offense set forth in § 2113(d), because it did not require the jury to find that any person was in fact in danger of harm from the use of a dangerous weapon. This being the case, the jury verdict under Count 3 was simply another conviction for unaggravated bank robbery for which the maximum sentence is 20 years.

18 U.S.C. § 2113(a) prescribes a twenty-year maximum sentence for "whoever, *by force and violence, or by intimidation,* takes . . . any property . . . belonging to . . . any bank. . . ." 18 U.S.C. §2113(d) provides that "whoever, in committing . . . any offense defined in subsections (a) and (b) of this section, *assaults* any person, or *puts in jeopardy* the life of any person by the use of a dangerous weapon or device, shall be . . . imprisoned not more than twenty-five years". (Emphasis supplied.) The aggravated form of the offense is not merely the commission of the basic offense by use of a dangerous weapon, but the use of a dangerous weapon in committing the basic offense in such a way as to put in jeopardy the life of a person or assault a person by the use of a dangerous weapon.

The word "jeopardy" has in common parlance a connotation of actual danger, without regard to the mental state of the victim. To put a person in fear, through threats which a criminal does not have the present intention or ability of carrying out, does not necessarily put his life in jeopardy. The applicability of the common meaning of the word "jeopardy" is confirmed by its context in the statute.

The use of the phrase "puts his life in" makes it clear that "jeopardy" was not to be equated with "fear". See *United States* v. *Donovan*, 242 F.2d 61, 63 (2d Cir. 1957):

> "The ordinary dictionary definition of 'jeopardy,' however, suggests a different meaning. That term is commonly defined as referring to an objective state of danger, not to a subjective feeling of fear.[1] Doubtless, dictionary meanings are not always infallible guides, but that meaning is the one that best fits the phrasing of this statute. 'Jeopardy' appears in the phrase 'puts his life in jeopardy.' To construe that word as meaning 'fear' would result in the phrase 'puts his life in fear', which would indeed be a strange use of language. Persons are put in fear, lives are not; they are put in danger.
>
> The purpose of the statute and the ordinary meaning of 'jeopardy' proceed *pari passu*, and we are satisfied that 'jeopardy' means danger and not fear.
>
> 1. The Merriam-Webster New International Dictionary, 2d ed., gives this definition of 'jeopardy': 'Exposure to death, loss or injury; hazard; danger.'
>
> Almost identical is the definition in the Funk & Wagnalls New Standard Dictionary: 'Exposure to death, loss, or injury; danger; hazard.'
>
> The Oxford Dictionary, Vol. 5, p. 568, gives this definition: 'Risk of loss, harm, or death; peril, danger.'"

The statute uses "assaults" as an alternative to "puts in jeopardy". Clearly, "assaults", like "puts in jeopardy", is modified by the phrase "by the use of a dangerous weapon or device," for a simple assault is necessarily involved in

the commission of a robbery, and if "assaults" is unmodified then every robbery would be an aggravated offense under §2113(d). See *People* v. *Logan*, 41 Cal. 2d 279, 260 P.2d 20 (1953); 77 C.J.S. *Robbery* §1 (1952). Whatever may be the rule with respect to a simple assault or an assault "armed with a dangerous weapon", an assault "by the use of a dangerous weapon" requires the showing of an objective state of danger to the assailant's victim. See, *e.g.*, *Price* v. *United States*, 156 Fed. 950 (9th Cir. 1907); *People* v. *Wood*, 199 N.Y.S. 2d 342 (App. Div. 1960); Annotation, 74 A.L.R. 1206 (1931). Thus conviction under § 2113(d) whether based on "assaults" or "puts in jeopardy" requires a jury finding of objective peril.

What authority there is under § 2113(d) supports the conclusion that an objective state of danger is an essential element of the aggravated offense. *E.g.*, *Meyers* v. *United States*, 116 F.2d 601 (5th Cir. 1940), *aff'd per curiam on motion for rehearing*, 116 F.2d 603 (1941); *United States* v. *Gebhart*, 90 F. Supp. 509 (D. Neb. 1950). And recent cases under 18 U.S.C. § 2114, the mail robbery statute, where similar language appears, agree that the phrase refers to an objective state of danger. See *United States* v. *Donovan*, 242 F.2d 61 (2d Cir. 1957); *Wagner* v. *United States*, 264 F.2d 524, 530 (9th Cir. 1959), *cert. denied*, 360 U.S. 936, *petition for rehearing denied*, 361 U.S. 857:

> "We agree that the aggravated form of robbery described in the latter part of § 2114 as putting 'life in jeopardy by the use of a dangerous weapon' means more than a 'mere holdup by force or fear'. It must be a holdup involving the use of a dangerous weapon actually so used during the robbery that the life of the person being robbed is placed in an *objective* state of danger." (Emphasis supplied.)

In its instruction to the jury the trial judge referred six times to Count 3.

In the first two references he simply quoted or closely paraphrased § 2113(d), without seeking to explain its meaning:

> "What the government charges in that count, count 3, is they committed the robbery, the offense charged in count 2, in an aggravated manner. That is, they assaulted and put in jeopardy lives of certain persons by the use of a dangerous weapon" (No. 179, R. 9).

> "The third count with respect to the aggravated aspect of it, whoever, in committing or in an attempt to commit any of these offenses that I have already pointed out in these two sections, entering to rob and robbing, whoever committed these offenses, and assaults any person or puts in jeopardy, in danger, jeopardy means, the life of any person by the use of a dangerous weapon, and so forth, may be punished in accordance with the statute" (No. 179, R. 10).

By the next two references the trial judge indicated he believed—and led the jury to believe—that the only element necessary to establish aggravation was the use of a dangerous weapon:

> "So to sum up at the risk of repetition, we have three counts, first, entering with the intent to rob; second, the actual robbery of the bank; and third, committing the robbery set forth in the second count under aggravated circumstances, to wit, by the use of a dangerous weapon" (No. 179, R. 10-11).

> "Two persons, if a person or two persons point a pistol or pistols at a third person who has custody of the money while in close proximity to him or them, in con-

sequence of which the property or money in his care or their care is taken away and against their will, there can be no doubt that this amounts to robbery. That is practically a repetition of what I have said already—and a violation of the statute and also, as charged in count 3, the aggravation aspect, it amounts to an assault and putting in jeopardy the life of the person by use of a dangerous weapon" (No. 179, R. 11).

In the fifth reference, the court distinctly misdefined the aggravation by defining it in terms of "fear" rather than objective danger:

"Under count 3, the question is, did they rob the bank under aggravated circumstances, put in fear the life of a person by the use of a pistol?" (No. 179, R. 12).

This statement not only overrode any possibly helpful effects which the judge's reference to "danger" in the confusing second reference quoted above might have served; it also in effect—and particularly when taken with the third and fourth reference—directed the jury to find the petitioner guilty on the third count even though only the elements of the basic, rather than the aggravated, offense were found.

The sixth reference goes even further, by taking from the jury altogether any question about the element of aggravation:

"And then there is no contention in respect to the third count of the indictment, that whoever robbed that bank put in jeopardy the lives and the persons who had custody of that money by the use of a dangerous weapon. The evidence in the case pointed to that and counsel for the defense do not dispute that fact so we have those facts to put to one side" (No. 179, R. 15).

The case was defended on the ground that the defendants were not the robbers. The defense conceded that the robbery took place and that persons were placed in *fear* by the use of guns. But whether the aggravated offense was committed would depend upon the intent, readiness and ability of the robbers to fire their pistols. Whatever the evidence required to support a finding of the requisite intent and objective danger, the question must at least be put to the jury. The result of the court's withdrawing this question from the jury is that all the petitioner was convicted of was robbery using a dangerous weapon, which is nothing more than a form of the offense defined in § 2113(a) for which no increase in maximum punishment is authorized, and for which the maximum permissible sentence is twenty years.

C. *The Illegality of Twenty-Five Year Sentence Imposed by the Trial Court May Be Challenged by Petitioner's Motion under Rule 35.*

Rule 35 of the Federal Rules of Criminal Procedure provides that "the court may correct an illegal sentence at any time". It is perfectly clear in the light of *Prince* v. *United States*, 352 U.S. 322 and *Heflin* v. *United States*, 358 U.S. 415, that a motion under Rule 35 is a proper method for challenging the legality of multiple sentences under the bank robbery statute. Neither the Government in the court below nor that court itself questioned the availability of Rule 35 to raise this issue.

However, both courts below refused even to consider the substantive question whether, in view of the trial court's instructions in this case, a twenty-five year sentence was authorized for the conviction under Count 3. The theory for this refusal was that matters relating to instructions to the jury are reviewable on appeal and therefore are not

within the scope of things which may be examined on a motion under Rule 35. There are unquestionably strong reasons of policy why the outcome of a criminal trial, conviction or acquittal, should generally become final with reasonable promptness. See, *e.g.*, FED. R. CRIM. P. Rule 33 (motion for new trial must be made within two years if based on newly discovered evidence, otherwise within five days) and FED. R. CRIM. P. Rule 34 (motion for arrest of judgment must be made within five days or such further time as the court may fix during the five-day period). But FED. R. CRIM. P. Rule 35 provides specifically that a motion to correct an illegal sentence may be made at any time.

A jury verdict of conviction is actually entered in response not to the indictment but to the trial court's instructions. What the jury's verdict means can only realistically be ascertained by reference to the instructions. "The basis on which a jury convicts is authoritatively to be taken from what the judge tells the jury." *Rosenberg* v. *United States*, 346 U.S. 273, 303 (dissenting opinion of Frankfurter, J.). See also *Shelton* v. *United States*, 235 F.2d 951, 954 (4th Cir. 1956):

> "In view of the extraordinary circumstances above described, which make it uncertain whether the verdict of the jury was directed to the counts as they actually appeared in the indictment or to the counts as erroneously described by the judge, the verdict does not afford a sound basis for a valid judgment. We are unable to say beyond a reasonable doubt what were the precise charges that the jury had in mind in announcing its conclusions."

This Court has said that FED. R. CRIM. P. Rule 35 is for the correction of sentences "that the judgment of conviction did not authorize". *United States* v. *Morgan*, 346 U.S. 502,

506. Petitioner in this case does not seek a new trial or a redetermination of facts. He does not now challenge the validity of the jury verdict of conviction. His position is simply that the only offense put to the jury, and therefore, the only offense of which he stands convicted is unaggravated robbery, and that the maximum sentence authorized for that offense is twenty years. The validity of his claim can be ascertained from an examination of his trial record without the necessity of any further factual inquiry outside the record. Cf. *Ladner* v. *United States*, 358 U.S. 169. And relief in this branch of the case would be effectuated simply by reducing his sentence from twenty-five years to the statutory maximum of twenty years.

As the *Ladner* case shows, this Court has in the past looked behind the mere form of a judgment to find out the substance of a criminal conviction, even when that required the ascertainment of facts which could not be determined solely from the records of the trial court. Certainly in a case where a stenographic transcript is available, there is no reason to refuse, in effect, to look at it to determine the substance of what was done.

The court below stated that an error in the charge could have been raised on appeal. But obviously this is no bar to consideration under Rule 35. Any illegality of sentence could have been raised on appeal. Rule 35 stands broadly for the proposition that a sentencing error, amounting to illegality, which can be corrected without a retrial, can and should be corrected at any time. Cf. *Askins* v. *United States*, 251 F.2d 909 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 923.

Even if Rule 35 did not permit entertainment of this part of petitioner's claim, his argument should be heard as a motion under 28 U.S.C. § 2255, or as a motion in the nature of a writ of error *coram nobis*. Cf. *Heflin* v. *United States*,

358 U.S. 415; see *United States* v. *Morgan*, 346 U.S. 502. Petitioner is in custody under the twenty-five year sentence which he challenges and he is claiming the right to be relieved of that sentence. And, depending upon what action the trial court takes if his case is remanded for resentencing for failure to comply with Rule 32(a), he may have already served the term for which he is resentenced and therefore be entitled to release altogether. Even if his other sentences may prevent immediate release upon granting the relief he requests in this branch of his case, he is seeking release from custody under that sentence, and the effect of granting relief will be to enable him to be released entirely from federal custody at an earlier date than his present commitment would permit.

Conclusion

There is no area of the law where a higher standard of punctilious application of every applicable legal protection is called for than in sentencing. What the court below has done is at best to leave unaffected a slipshod and, at least in some respects, illegal imposition of punishment on the petitioner. It is respectfully submitted that to affirm the action of the lower courts in this case will inspire only disrespect for the law's processes by those charged with its administration and those affected by that administration.

To avoid further injustice to the petitioner, it is urged that, if the petitioner's case is remanded for resentencing, this Court's order provide that in resentencing the petitioner should be given full credit for time already served on the sentences under question, and that for purpose of good-time credits and parole regulations any new sentence imposed be deemed to run from the date of the original sentences. See, *e.g.*, *McDonald* v. *Moinet*, 139 F.2d 939, 941

(6th Cir. 1944); *McDonald* v. *Looney*, 238 F.2d 844, 845 (10th Cir. 1956); *Lewis* v. *Commonwealth*, 329 Mass. 445, 108 N.E. 2d 922 (1952); Annotation, 35 A.L.R. 2d 1283, 1288 (1954). Failure to give such credit would severely penalize petitioner for asserting his rights in an instance where the Court has the power to avoid such a penalty.

It is therefore respectfully submitted that this Court should reverse the judgments of the court below, and remand with directions that the district court bring the petitioner before it for resentencing, afford the petitioner an opportunity to make a statement in his own behalf pursuant to FED. R. CRIM. P. Rule 32(a), and resentence the petitioner for a term to end not more than twenty years from the date of his original commitment, such new sentence to be deemed, for purposes of good-time credits and eligibility for parole, to run from the time of his original commitment.

Respectfully submitted,

JAMES VORENBERG,
50 Federal Street,
Boston, Massachusetts.

Attorney for Petitioner

November 1960

Appendix

18 U.S.C. § 2113

"§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of

subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term 'savings and loan association' means any Federal savings and loan association and any 'insured institution' as defined in section 401 of the National Housing Act, as amended, and any 'Federal credit union' as defined in section 2 of the Federal Credit Union Act."

FEDERAL RULES OF CRIMINAL PROCEDURE

"Rule 32. Sentence and Judgment.

(a) SENTENCE. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) JUDGMENT. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and

sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law."

* * * * *

"Rule 35. Correction or Reduction of Sentence. The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

* * * * *

"Form 25. JUDGMENT AND COMMITMENT

In the United States District Court for the .....
District of ....., ... Division

UNITED STATES OF AMERICA)
)
v.) No. .....
)
.....)

JUDGMENT AND COMMITMENT

On this ..... day of ....., 19...., came the attorney for the government and the defendant appeared in person and[1] .....

It is Adjudged that the defendant has been convicted upon his plea of[2] ..... of the offense of .... as charged[3] .....; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] .....
.....

---

[1] Insert 'by counsel' or 'without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel.'

[2] Insert (1) 'guilty', (2) 'not guilty, and a verdict of guilty', (3) 'not guilty, and a finding of guilty', or (4) '*nolo contendere*', as the case may be.

[3] Insert 'in count(s) number .....' if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or

It is Adjudged that[5] .....

.....

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

.....,
United States District Judge.

The Court recommends commitment to:[6] .....

.....

.....,
Clerk.

[Endorsement]

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on ..... to .....

Defendant noted appeal on .....

Defendant released on .....

Defendant elected, on ....., not to commence service of the sentence.

Defendant's appeal determined on .....

Defendant delivered on ..... to ..... at ....., the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

.....,
United States Marshal."

---

unserved sentence; (3) whether defendant is to be further imprisoned until payment of fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

FILE COPY

PETITION NOT PRINTED

Nos. 70, 179

In the Supreme Court of the United States

OCTOBER TERM, 1960

THEODORE GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

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Solicitor General,
MALCOLM RICHARD WILKEY,
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CITATIONS

Cases—Continued

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OCTOBER TERM, 1960

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THEODORE GREEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

In No. 70, the opinion of the court of appeals is reported at 273 F. 2d 216 (R. No. 70, p. 34) and the opinion of the district court at 24 F.R.D. 130 (R. No. 70, p. 28).

In No. 179, the opinion of the court of appeals is reported at 274 F. 2d 59 (R. No. 179, p. 26); the memorandum of the district court (R. No. 179, p. 2) is not reported.

JURISDICTION

In No. 70, the judgment of the court of appeals was entered on December 8, 1959 (R. No. 70, p. 37); the petition for a writ of certiorari was filed on December

28, 1959, and was granted limited to one question on April 18, 1960 (R. No. 70, p. 38; 362 U.S. 949).

In No. 179, the judgment of the court of appeals was entered on January 20, 1960 (R. No. 179, p. 29); the petition for a writ of certiorari was filed on January 30, 1960, and was granted (and consolidated for argument with No. 70) on June 27, 1960 (R. No. 179, p. 30; 363 U.S. 839).

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a sentence must be vacated, on motion made seven years after its imposition, on the ground that the court did not invite petitioner personally to speak at the hearing on sentencing, at which counsel was invited and did speak at length on petitioner's behalf.

2. Whether a twenty-five-year sentence for aggravated bank robbery must be vacated on the ground that the court, in simultaneously imposing concurrent sentences for counts of entry, robbery, and aggravated robbery, exhausted its power to sentence after the imposition of sentence on the entry count.

3. Whether a sentence for aggravated bank robbery can be "corrected," on motion made seven years after imposition of sentence, to reflect punishment for simple bank robbery on the ground that the jury was improperly instructed as to the aggravated circumstances.

STATUTE AND RULES INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—
>
> Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.
>
> * * * * *
>
> (d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

* * * * *

Rule 32(a) of the Federal Rules of Criminal Procedure provides:

> SENTENCE. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or

alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

Rule 35 of the Federal Rules of Criminal Procedure provides:

> CORRECTION OR REDUCTION OF SENTENCE. The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari.

STATEMENT

On October 22, 1952, petitioner and another were convicted, after a jury trial in the United States District Court for the District of Massachusetts, on a three-count indictment charging bank robbery. Count 1 charged entry with intent to commit a felony, and Count 2 charged robbery, in violation of 18 U.S.C. 2113(a). Count 3 charged assault and the jeopardizing of lives by a dangerous weapon during the course of the robbery, in violation of 18 U.S.C. 2113(d) (R. No. 70, pp. 1–3). On October 27, 1952, petitioner was sentenced to imprisonment for twenty years on Count 1, twenty years on Count 2, and twenty-five years on Count 3, the sentences to run concurrently and to begin upon his release from prison on a state sentence he was then serving (R. No. 70, p. 24).

I. POST-CONVICTION PROCEEDINGS

(a) PRIOR PROCEEDINGS

After sentencing, a notice of appeal was filed and two motions for enlargement of time for filing the record were granted. The trial court ordered that petitioner be permitted to prosecute his appeal *in forma pauperis* and that a transcript be furnished him. On April 17, 1953, the court of appeals ordered that the appeal be dismissed "for want of diligent prosecution" (see the Government's Brief in Opposition, Oct. Term 1958, No. 143 Misc., certiorari denied, 358 U.S. 854).

On April 20, 1956, petitioner filed a motion to vacate sentence under 28 U.S.C. 2255, claiming that he had been denied the right to a fair trial because of the action of the trial judge in allowing the jury to see the original indictment upon which there appeared certain penciled notations by the clerk. Petitioner was allowed to proceed *in forma pauperis*, the district court denied the motion, and the court of appeals summarily affirmed the order of denial on December 10, 1956. *Green* v. *United States*, 238 F. 2d 400.

On January 14, 1958, petitioner filed another motion to vacate sentence, alleging that he had been deprived of his right to a fair trial by the action of the Assistant United States Attorney in persuading government witnesses to give perjured testimony and that he had been deprived of effective assistance of counsel because of collusion between the government attorney and his own counsel. The issues were resolved against

him: *Green* v. *United States*, 256 F. 2d 483, certiorari denied, 358 U.S. 854.

(*b*) PRESENT PROCEEDINGS

(*i*) *No. 70*

Subsequently, petitioner filed, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, the motion to set aside sentence which initiated the present proceeding in No. 70. In that motion he alleged that the judgment was void because his sentence was announced orally by the clerk of the court, rather than by the court, after the clerk and the court had conferred out of his hearing, and that he must be resentenced because the court, before imposing sentence, failed to ask him specifically if he wished to say anything (R. No. 70, p. 27).

Petitioner was permitted to proceed *in forma pauperis*. On June 15, 1959, the district court denied the motion (*United States* v. *Green*, 24 F.R.D. 130; R. No. 70, pp. 28–31). It found nothing improper in the pronouncement of sentence. It questioned whether Rule 32(a) of the Federal Rules of Criminal Procedure required that a defendant, competently represented by counsel, be invited to speak on his own behalf, and it held that in any event petitioner had not shown that if he had been offered the opportunity to speak in person he would have added anything to what his counsel already had said.

The court of appeals affirmed *per curiam* on December 8, 1959 (273 F. 2d 216; R. No. 70, pp. 34–37), noting that, while it might be the better practice for

the trial court, before imposing sentence, to ask the defendant personally if he wanted to make a statement, the court of appeals was not prepared to hold that Rule 32(a) required such personal solicitation when counsel had been given full opportunity to speak and had spoken at length in mitigation of punishment and the matters bearing thereon. The court observed that even now petitioner did not indicate what, if anything, he might have been able to add to counsel's statements.

This Court granted certiorari limited to the question of whether the judgment was invalidated where the court did not offer the defendant an opportunity to speak (R. No. 70, p. 38).

(ii) No. 179

On October 9, 1959, petitioner filed a second motion pursuant to Rule 35 which forms the basis for the issues in No. 179. He alleged (R. No. 179, p. 1) that his sentence on Count 3 was void because (1) the court had exhausted its power to sentence after the imposition of sentence on Count 1, and (2) the trial court did not properly instruct the jury as to the law on Count 3. On October 15, 1959, the district court denied the motion (R. No. 179, pp. 2–3). It held that the matter of the instructions could not be raised in a Rule 35 motion and was, moreover, without merit. As to sentencing, the court held that the judge simultaneously imposed the three concurrent sentences of twenty, twenty, and twenty-five years; and ruled that, while there was authority from which it might be held

that the crimes of entry and robbery in Counts 1 and 2 merged into the crime of aggravated robbery in Count 3, there was no authority or reason for setting aside the twenty-five-year concurrent sentence on that count.

The court of appeals affirmed *per curiam* on January 20, 1960 (*Green* v. *United States*, 274 F. 2d 59; R. No. 179, pp. 26–29). It held that the question of the allegedly erroneous instruction could not be converted into a basis for collateral attack under Rule 35 by the device of alleging that because of the error no responsive verdict could be found. It also held that, while petitioner should have received only a single sentence on the three counts charging entry, robbery and aggravated robbery, the twenty-five-year sentence on Count 3, carrying the greater penalty, was the valid one. The court saw no reason for affording petitioner the "paper satisfaction," not asked for, of vacating the twenty-year concurrent sentences on Counts 1 and 2.

This Court granted certiorari on June 27, 1960, and consolidated the case with No. 70 (R. No. 179, p. 30).

2. THE TRIAL COURT'S INSTRUCTIONS

The trial court, after instructing the jury at length as to general principles of law, explained the three counts of the indictment (R. No. 179, see pp. 4–9). With regard to Count 3, it said *inter alia* (R. No. 179, p. 10):

> The third count with respect to the aggravated aspect of it, whoever, in committing or in an attempt to commit any of these offenses that

> I have already pointed out in these two sections, entering to rob and robbing, whoever committed these offenses, and assaults any person or puts in jeopardy, in danger, jeopardy means, the life of any person by the use of a dangerous weapon, and so forth, may be punished in accordance with the statute.

Shortly thereafter, the court, in repeating the issues before the jury, said (R. No. 179, p. 12):

> Under Count 3, the question is, did they rob the bank under aggravated circumstances, put in fear the life of a person by the use of a pistol?

After instructing at length as to the nature of, and the weight to be given, the evidence, the court then said (R. No. 179, p. 15):

> Now, there are some things in this case I must point out to you, that there is no controversy at all about, and counsel pointed that out to you, counsel for defendants and counsel for Government point out to you. The defendants' counsel do not dispute that a robbery of the Norwood Bank was committed. There is no question on this evidence that a finding that a robbery was committed could be found, and they don't deny that.
>
> What they do deny, that either or both of these defendants, Mr. Juggins for Jacobanis said he was not concerned with the crime, and Mr. Callahan for defendant Green contends that is their position. They say that the defendants they respectively represent were not concerned in the crime but they do agree that the bank was robbed.

> And then there is no contention in respect to the third count of the indictment, that whoever robbed that bank put in jeopardy the lives and the persons who had custody of that money by the use of a dangerous weapon. The evidence in the case pointed to that and counsel for the defense do not dispute that fact so we have those facts to put to one side.

In concluding its charge, the court instructed that the jury would deliberate and return a verdict on each count—Count 1, Count 2, and Count 3.

Defense exceptions went only to the failure to give additional requested instructions on the credibility of witnesses and corroboration of accomplices (R. No. 179, pp. 18–23).

3. THE SENTENCING

After the return of the verdict, the government moved for sentencing (R. No. 179, p. 23). The court, on inquiry of the probation officer, was informed that the narrative probation reports were not complete. The court asked for and received the officer's investigative reports. The following colloquy then took place (R. No. 179, pp. 23–24):

> The COURT: Do the defense counsel want to be heard with respect to any matter at this point?
>
> Mr. CALLAHAN: Judge, so far as the defendant Green is concerned, we are ready for the disposition but I would like to address your Honor on it.
>
> The COURT: Yes, I know, your attitude probably would be the same, Mr. Juggins?

Mr. JUGAINS: Yes, your Honor.

The COURT: I am not quite prepared to sentence the defendants at this moment. The probation reports have just been presented to me. I want to read and study those and I want to give some consideration to the matter of law involved with respect to the counts on which the defendants are found guilty and I will postpone the matter of sentence. I am going to postpone sentence until Monday morning at eleven o'clock. I want to give the matter some thought.

When the court reconvened for sentencing, it heard: first, an argument from defense counsel on a motion in arrest of judgment[1] (denied thereafter); second, a statement from the Assistant United States Attorney on sentencing; and, third, an argument from defense counsel on a motion for a new trial directed toward the weight and sufficiency of the evidence (R. No. 70 pp. 4–18). Then the court asked defense counsel if he wanted to say something. In response, counsel spoke for lenience in sentencing (R. No. 70, pp. 18–19). He informed the court that petitioner was 37 years of age, and had a family—a wife and two children, one fourteen and one nine years of age—whom petitioner had supported except for a period when he was incapacitated by an injury to his arm suffered from a fall in a state prison. Counsel reasoned that, since any sentence imposed on petitioner would prevent his getting parole on a state court sentence of 15½ to 20 years

[1] The motion argued that conviction on Counts 1 and 2 constituted double jeopardy in view of conviction on Count 3.

he was then serving, and since there was a chance that petitioner might be convicted on four other indictments then pending against him, petitioner would be "under lock and key for a good many years" anyway and would be in no condition to commit other offenses.

The court reviewed the evidence (R. No. 70, pp. 21–22), denied the motion for a new trial, and then took up the question of the sentence. It observed that petitioner and his co-defendant were gunmen who, the evidence showed, would not hesitate to kill (R. No. 70, pp. 22–23); pointed out that the two men had persisted in committing armed robbery even after their release from prison on similar offenses; said that in its opinion they would never reform, adding that there was not one word that could properly be said that would warrant the court in believing they could be rehabilitated; and noted that petitioner's criminal record went back to 1931—a record of serious crimes involving the use of guns. The court then pronounced sentence (through the clerk) as follows (R. No. 70, p. 23):

> Theodore Green, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment that you be imprisoned for 20 years, and on Count 3 of the indictment that you be imprisoned for the period of 25 years, said prison sentence to run concurrent and to begin upon your release from prison upon the sentence you are now receiving under order of the State Court.

SUMMARY OF ARGUMENT

I

A. Rule 32(a) of the Federal Rules of Criminal Procedure does not impose a mandate upon a sentencing court to invite a defendant personally to speak on his own behalf. The requirements of the Rule are met where, as here, counsel for a defendant is invited and does speak at length before sentencing, and where there is no indication by counsel or the defendant that the defendant wishes to be heard further.

1. The language of the Rule does not say that the court "must" or even "shall" ask the defendant anything; it speaks only of *affording* the defendant *an opportunity to* be heard. When the word "defendant" is used in several instances in the Rules it is understood that the defendant will act through counsel. That meaning is likewise appropriate for Rule 32(a).

2. The history of the Rule shows that the wording in question is merely an express recognition of the right of the defendant, through counsel or personally, to present information before sentencing. In our view, the framers of the Rules did not intend to incorporate in all its rigidity the old English practice of *allocutus*, whereby it was indispensably necessary that a sentencing court ask a convicted felon if he had "anything to say" why judgment should not be pronounced against him. *Allocutus* arose in English law at a time when an accused person was not permitted to have counsel to defend him and when it was therefore necessary to ask the convicted person if he

had matters to urge in arrest of judgment or mitigation of punishment. The practice was never enforced strictly in this country except with respect to capital offenses, and even in capital offenses the failure to observe the formality resulted only in the case being remanded for resentencing. Moreover, American courts have held that the right of *allocutus* was exercised once the defendant had moved in arrest of judgment or for a new trial.

In the light of the original purpose of *allocutus* and its limited adoption in this country, there is no reason to conclude that the framers of the Rules, in modernizing and simplifying general criminal procedure for federal felonies and misdemeanors, intended the mild language of Rule 32(a)—that the defendant shall be afforded an opportunity to make a statement in his own behalf—to represent a strengthened reincarnation of the long departed ritual of *allocutus*.

3. In every judicial circuit which has considered the Rule (with the exception of the District of Columbia Circuit which has established its own procedure under the Rule), the law is that once the court (as here) has disposed of all motions pending after verdict, has made an appropriate inquiry (from counsel and reports) into the legal and factual circumstances bearing on sentencing, and has received no indication that the defendant wishes to be heard further, it may sentence in full compliance with the letter and spirit of the Rule. Even the District of Columbia Circuit has held back from a clear pronouncement that the Rule *per*

so requires more, deciding only that, as a matter of its supervisory power, it would *in the future* require district courts to receive assurance directly from the defendant that he does not wish to be heard further.

4. In the present case, there is no doubt that petitioner's trial counsel received full opportunity, which he used, to argue with respect to the sentence, and that neither petitioner nor his counsel indicated in any way that petitioner desired to be heard himself.

B. Even if it be assumed that there had been error in the failure of the trial judge to inquire directly of petitioner if he had anything to say, it would not have been an error that could have been raised collaterally seven years after sentence. The error, if any, was at most a minor procedural defect which would not have furnished grounds for reversal even on direct appeal. It is not cognizable under the narrow remedy afforded by Rule 35 to bring a truly illegal sentence into conformity with the law. Neither is it a fundamental procedural error of unusual character which would furnish a basis for collateral attack under the broader remedy afforded by 28 U.S.C. 2255, as a substitute for habeas corpus.

II

The twenty-five-year sentence on Count 3 is the valid sentence which should be left standing. It is the only sentence which provides punishment for the total offense for which petitioner was found guilty—embracing the two elements of (1) the robbery (or entry with intent to commit a robbery) and (2) the putting of a life in jeopardy during the course of the robbery.

Counts 1 and 2 did not cover the element of putting a life in jeopardy. It cannot be said that the court exhausted its power when it imposed a sentence on those counts since it had not then sentenced for the total crime which the jury found had been committed. The twenty-five-year sentence, moreover, is the sentence which represents the intent of the trial judge as to the punishment merited by the total offense for which petitioner was convicted. Reason and authority both dictate that this obvious intention should be given effect.

III

A. The matter of instructions to the jury with respect to the aggravated form of the offense cannot be raised in a motion to correct sentence under Rule 35. The relief afforded by the first part of that Rule is available only to correct an illegal sentence, one which can be shown to be illegal without resort to the trial proceedings. Trial errors cannot be raised under Rule 35.

Petitioner attempts to hurdle this barrier by his contention that because the instructions failed properly to define the aggravated offense of robbery the conviction on Count 3 must be taken as one for simple robbery subject to a maximum sentence of 20 years. However, the record shows that petitioner was indicted under Count 3 for aggravated robbery, that the jury returned a verdict of guilty on Count 3, and that the sentence imposed was within the maximum provided for aggravated robbery. On the strict record to which relief under Rule 35 is limited, the

conviction was plainly for aggravated robbery; petitioner's attack, no matter how disguised, goes to the instructions, which cannot properly be considered.

B. Likewise, petitioner's challenge to the instructions does not furnish a basis for invoking a remedy under 28 U.S.C. 2255. Instructions, if incorrect, constitute trial error. Petitioner did not pursue his direct appeal and there are no circumstances here which would bring this belated contention within the scope of collateral attack delineated by this Court's decision in *Sunal v. Large,* 332 U.S. 174. The courts of appeals have held unanimously that an attack on instructions cannot be presented under 28 U.S.C. 2255.

C. Finally, petitioner's arguments that the court failed to charge, or require deliberation, as to the aggravated offense of bank robbery are lacking in merit, and would not have furnished grounds for relief even on direct appeal. The jury was told that it must return a verdict as to each of the three counts. Petitioner does not deny that the basic explanation of Count 3 was adequate; the jury was told that jeopardy meant "danger." The one casual reference to "fear" (in another part of the charge) could not have been misleading in view of the whole charge, the contested issues, and the undisputed fact that a pistol (a weapon universally regarded as creating "danger", as well as evoking "fear") was used as the robbery instrument.

ARGUMENT

I

PETITIONER'S SENTENCE WAS NOT INVALID FOR FAILURE TO COMPLY WITH RULE 32(a)

In the first of his current motions under Rule 35 of the Federal Rules of Criminal Procedure (No. 70), petitioner, citing Rule 32(a), contends that the judgment against him is invalid because the trial court, in imposing sentence, did not first invite him personally to speak in his own behalf. It is the government's position that Rule 32(a) imposes no such mandate upon the court, that the letter and the spirit of Rule 32(a) were met when counsel was invited and did speak at length on petitioner's behalf, and that, even if it would have been better judicial practice to have asked petitioner personally if he had anything to say, the failure to do so is not a ground for collateral attack on the sentence.

A. THE REQUIREMENTS OF RULE 32(a) ARE MET WHEN A DEFENDANT, AS IN THIS CASE, HAS HAD A FULL OPPORTUNITY TO BE HEARD THROUGH COUNSEL AND THERE IS NO INDICATION THAT THE DEFENDANT DESIRES TO BE HEARD FURTHER

Rule 32(a) provides:

> Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

The last sentence of this subdivision—read in the light of its phrasing, its context, and the general

purpose and origin of the Rule—means to us just what its words say, *i.e.*, that the defendant shall have an opportunity to be heard before sentencing. It does not impose an affirmative mandate upon the sentencing court to address a specific invitation to a defendant to speak upon his own behalf.

1. The language of Rule 32(a)

The language of the Rule is significant in that it speaks only of *affording* the defendant *an opportunity* to make a statement in his own behalf or to present information in mitigation of punishment. This wording does not suggest that an opportunity afforded to counsel to speak or to present information is not an opportunity afforded to the defendant. The term "defendant" is used in many instances throughout the Rules where the obvious expectation is that the defendant will act through counsel, as where the Rules set out various procedural steps. See, *e.g.*, Rules 15(d), 16, 17(b), 21, 29. Even with respect to such matters as the entering of a plea of guilty under Rule 11, it is understood that an attorney may act for the defendant in his presence. See *United States* v. *Moe Liss*, 105 F. 2d 144 (C.A. 2); *United States* v. *Dennis-ton*, 89 F. 2d 696 (C.A. 2), certiorari denied, 301 U.S. 709. And, contrary to petitioner's view, the phrase "in his own behalf" does not, of itself, imply that the defendant is to speak personally; this phrase can just as easily be read as indicating the subject-matter to which the defendant's presentation (personally or through counsel) is to be directed.

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Moreover, the Rule does not say that the court "must ask": it does not even say that court "shall ask" the defendant. In this regard it is significant that the framers of the Rules in their Notes to the Preliminary Drafts (see A.L.I. Preliminary Draft, Rule 30, p. 131) invite comparison of this part of the Rule with Section 480 of the New York Code of Criminal Procedure which reads:

> When the defendant appears for judgment, *he must be asked* by the clerk whether he have [*sic*] any legal cause to show, why judgment should not be pronounced against him. [Emphasis added.]

In New York, even this provision has been construed as not entitling a defendant to resentencing where his right and opportunity to be heard were afforded through the plea of counsel. *People* v. *Sheehan*, 4 Misc. 2d 1049, 159 N.Y.S. 2d 932. Certainly, the milder language involved here can reasonably be so construed.

2. The history

The Advisory Committee Notes say only that subdivision (a) of the Rule is substantially a restatement of existing procedure under Rule I of the Criminal Appeals Rules of 1933, 292 U.S. 661.[2] The former

[2] Rule I of the Criminal Appeals Rules of 1933 provided: "After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in the Act of March 4, 1925, c. 521, 43 Stat. 1259, sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial is pending, or the trial court is of the opinion that there is reasonable ground for such a motion;

Rule was concerned with imposition of sentence without delay and with the disposition of motions, presentence investigation, and bail—procedures designed to expedite cases after verdict, while at the same time permitting delay in sentencing until there was a full inquiry into the relevant circumstances. These procedures are preserved in the first two sentences of Rule 32(a). The addition of the last sentence of subdivision (a) was, we think, merely a means of supplementing the inherent power of the court to receive information bearing on sentencing—an express recognition that a defendent has the right to be heard thereon.

The authorities have traced the procedure described in the last sentence of Rule 32(a) to the old English practice of *allocutus*, whereby a court, before sentencing a person convicted of a felony, was required to ask if the person had "anything to say" why judgment should not be pronounced against him. Whitman, *Federal Criminal Procedure* (1950), p. 234; Orfield, *Criminal Procedure From Arrest to Appeal* (1947), p. 540. *Allocutus* had its genesis in English law at a time when a person accused of a felony was not permitted to have counsel to defend him. 5 Holdsworth, *History of English Law* (1931), p. 192; 4 Blackstone, *Commentaries* (1897), p. 375. The invitation to speak was therefore, of necessity, extended to the defendant

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or (2) the condition of the character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed.

"Pending sentence, the court may commit the defendant or continue or increase the amount of bail."

personally. While the purpose of *allocutus* was to give a convicted person an opportunity to move in arrest of judgment or to plead the King's pardon, the practice was that, if he had nothing to urge in bar, he might also speak to facts in mitigation of punishment. 1 Chitty, *Criminal Law* (1847), p. 700. The inquiry was indispensably necessary and its omission was an error requiring reversal. *King* v. *Speke*, 3 Salk. 358, 91 Eng. Rep. 872; *Rex* v. *Geary*, 2 Salk. 630, 91 Eng. Rep. 532.

American courts in the last century upheld the right of *allocutus* only in restricted circumstances. See, generally, 2 Bishop, *Criminal Law* (2d ed. 1913), §§ 1293, 1294. Thus, it was for the most part enforced only with respect to capital offenses. See *Ball* v. *United States*, 140 U.S. 118; *Schwab* v. *Berggren*, 143 U.S. 442, 446–447; *Hamilton* v. *Commonwealth*, 4 Harris 129 (Pa.); *Bressler* v. *People*, 117 Ill. 422, 8 N.E. 62; *People* v. *Nesce*, 201 N.Y. 111, 94 N.E. 655. It was usually held not to be essential before sentence for other felonies. *People* v. *Palmer*, 105 Mich. 568, 63 N.W. 656; *Boehm* v. *State*, 190 Wis. 609, 209 N.W. 730; *Jeffries* v. *Commonwealth*, 12 Allen 145 (Mass.); *State* v. *Sims*, 117 La. 1036; *State* v. *Sally*, 41 Ore. 366. Contra, *Safford* v. *People*, 1 Parker (Cr.) 474 (N.Y.). And *allocutus* was never held to be required before sentence for misdemeanors. *Turner* v. *United States*, 66 Fed. 289; *State* v. *Lund*, 51 Kan. 1; *State* v. *Nagel*, 136 Mo. 45; *Hancock* v. *Rogers*, 140 Ga. 688, 79 S.E. 558.

Some of these earlier decisions questioned the necessity for the continued observance of this formality,

even with respect to capital offenses. In *Boehm* v. *State*, it was said (190 Wis. at 612, 613):

> * * * [I]t [the practice of *allocutus*] seems to have nothing more to support it than its traditionary existence. It is a mere custom and nothing else. In this day, when defendants in criminal cases are represented by counsel,—by counsel furnished by the State if they are unable to procure them,—who understand their legal rights and exert every effort to preserve them, who move in arrest of judgment and for new trials, and perfect their appeals to this court, how can it be said that the mere omission of the traditionary question, "Have you anything to say why judgment should not be pronounced?" constitutes anything like a substantial right? The proceeding has been characterized as "ridiculously idle" (*Warner* v. *State*, 56 N.J.L. 686, 29 Atl. 505); as "a most absurd, frivolous and idle ceremony" (*State* v. *Hoyt*, 47 Conn. 518); and in *People* v. *Palmer*, 105 Mich. 568, 63 N.W. 656, it is said: "Whichever good purpose this practice may have served in England when parties charged with crime were not allowed counsel, it is now a mere idle ceremony." It is time that the law be rid of this technicality, which rests only in tradition and is barren of any substantial benefit to the defendant.

See, also, *State* v. *Hoyt*, 47 Conn. 518;[3] *Dutton* v. *State*, 91 Atl. 417, 421 (Md.).

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[3] In *State* v. *Hoyt*, it was observed, 47 Conn. at 544–545: "If we compare the rules and practice that obtained in England with our own it will readily be suggested that the reasons that made the inquiry of the prisoner so essential do not apply at all in this state. Here the accused has always had

Most of these earlier decisions held that the right tendered by *allocutus* could be waived directly or by implication. It was held, for instance, that the right had been exercised once the defendant had moved in arrest of judgment or for a new trial. *State* v. *Hoyt, supra; Gannon* v. *People,* 127 Ill. 507; *Jeffries* v. *Commonwealth, supra,* 12 Allen 145; *State*

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counsel to represent him, vigilant to guard every right and claim every privilege deemed essential to his deliverance. The counsel well know that the verdict does not conclude the prisoner—they know all the remedies for ulterior relief and when and how they must be instituted. They are present when the prisoner, on motion of the Attorney for the State, is set at the bar to receive his sentence. They know that the court is open to hear any request, motion or objection, and that if the accused desires to say anything the court will grant him the privilege if he or they should so indicate.

"Under our practice what possible harm can be occasioned to the prisoner by such an omission on the part of the court? He can have no pardon to plead, for that can only come from the legislature after sentence, no attainder to save, no benefit of clergy to pray for.

"If he should say anything suggesting ground for some relief, his saying it would not be the remedy; it would have to take on some other legal form and be filed within the time prescribed. If he should in a capital case urge mitigating circumstances and put himself on the mercy of the court, it would avail nothing, because the court would have no discretion to exercise in regard to the punishment. If, as suggested in the argument, a possible utility of such inquiry might be to discover the prisoner's condition of mind as to sanity, we reply, not only that it would have no adaptation to such a purpose, but if it had there is no need of any such expedient under our law, which humanely allows a full year to intervene between the date of the judgment and its execution—affording most ample opportunity for such discovery or for any relief from the consequences of the conviction to which he may be entitled."

v. *Johnson*, 67 N.C. 55; *State* v. *Sally*, *supra*, 41 Ore. 366; *State* v. *Nagel*, *supra*, 136 Mo. 45. Even in those cases where the formality was thought to be necessary or desirable before pronouncement of death, the case was not remanded for a new trial but only for resentencing. *Commonwealth* v. *Preston*, 188 Pa. 429.

While the procedure of *allocutus* was a forebear of the last sentence of Rule 32(a) (see the Notes to the Preliminary Draft, Rule 30, F.R.Cr.P., pp. 131, 132), it seems plain that it was no more than a remote ancestor. The framers of these modern rules, who aimed at simplifying procedures already far removed from the ancient practice, did not intend to reinstate *allocutus* in all of its formal English rigidity. If they had so intended, the languge would doubtless have been more explicit. Note that the drafters invited comparison of their language with that of the mandatory language of the New York Code (discussed p. 20, *supra*), which nevertheless contemplates that counsel may speak for a defendant.[1] Further, the basic reason for adopting the formal practice of *allocutus* fails in our present-day system of criminal

[1] The Notes to the Preliminary Drafts also invite comparison with Section 389 of the American Law Institute Code of Criminal Procedure (1931), which provides that the court (or the clerk) "shall ask him [the defendant] whether he has any cause to show why sentence should not be pronounced." Section 390 of the Code provides that failure to comply with Section 389 shall be grounds for setting aside the sentence, and Section 391 lists the causes that the defendant may show as to why sentence should not be pronounced as being only (a) that he has become insane since the verdict, (b) that he has been pardoned of the offense, (c) that he is not the person against whom the judgment was rendered, (d) if the

jurisprudence. Today, counsel plays a vital part in the defense of an accused. In most cases, being more articulate and less personally involved, counsel is in a better position than the accused to speak with respect to matters of mitigation; and if counsel does wish the defendant to speak personally, he can himself call upon the defendant to do so. There is no obstacle to such a practice. Moreover, under our present procedure, at the time of sentence a convicted person has already had an opportunity to move for a new trial, or in arrest of judgment, or to file exceptions to rulings. Often, his background has been investigated and the pre-sentence report is before the court.[5] It is

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defendant is a woman, and the sentence is death, that she is pregnant.

Section 397 of the A.L.I. Code provides:

"*Inquiry into mitigating or aggravating circumstances.* Where the court has discretion as to the penalty to be inflicted on the defendant it shall, upon the suggestion of either party that there are circumstances which may properly be taken into consideration, hear evidence as to the same summarily in open court, either immediately or at a specified time and upon such notice to the adverse party as the court may direct; or the court may inquire into such circumstances of its own motion."

[5] Rule 32(c) provides:

"*Presentence Investigation.*

"(1) *When made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

"(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condi-

very difficult to imagine a situation in which a defendant represented by counsel might suffer from the omission of *allocutus* (in the sense of an express judicial invitation to speak personally).

In view of these considerations, it seems unlikely that the framers of the Criminal Rules would reach back into history to revive in full force an already obsolete ritual, noncompliance with which had been ground for invalidating a judgment, while at the same time making it applicable to misdemeanors (to which it was never applicable at common law) and to felonies not capital in nature (to which it was not extended by most of the common-law courts nor by federal decisions). Significantly, the Notes to the Preliminary Draft (Rule 30, p. 132) direct attention to what was federal law even at that time—the case of *United States* v. *Austin-Bagley Corp.*, 31 F. 2d 229 (C.A. 2), holding that the failure of a court to inquire of a defendant why sentence should not be pronounced (in a non-capital case) was harmless error.

3. The judicial decisions

We conclude from the foregoing discussion (*supra*, pp. 18–27) that, when a court has disposed of all motions pending after verdict and has made an appropriate inquiry into the legal and factual circumstances bearing on sentencing, obtained from investigative reports and from counsel, and has received no indica-

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tion and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court."

tion that a defendant wishes to be heard further, it may sentence in full compliance with the letter and spirit of Rule 32.

This is the law in the circuits which have considered this aspect of the Rule, with the exception of the District of Columbia Circuit which has established its own procedure under the Rule. The Tenth Circuit, in *Baird* v. *United States*, 250 F. 2d 735, found that the Rule was complied with when the court had heard counsel and had granted several continuances in order to obtain pre-sentence information. The court of appeals noted that there was nothing in the record to show that either the defendant or his counsel had been denied the right to present facts in mitigation of punishment. See, also, *Pence* v. *United States*, 219 F. 2d 70 (C.A. 10); *Calvaresi* v. *United States*, 216 F. 2d 891, 901 (C.A. 10), reversed on other grounds, 348 U.S. 961. And the Court of Appeals for the Sixth Circuit, in *Sandroff* v. *United States*, 174 F. 2d 1014, 1020 (C.A. 6), certiorari denied, 338 U.S. 947, observed [in circumstances where the court posed a general inquiry, "Anything further?", and neither the defendant or his counsel spoke up] that it could not say that the defendant was not afforded an opportunity to make a statement since there was nothing to indicate that he was shut off. The court said that, while it would have been in appropriate conformity with the Rule had the court asked Sandroff whether he desired to make a statement, it would appear from his inaction that he did not wish to do so. The Fifth Circuit has observed that *Sandroff*, *supra*, correctly

states the law (while actually holding that the alleged error in complying with the Rule could not be raised in a collateral proceeding under 28 U.S.C. 2255) (*Mixon* v. *United States*, 214 F. 2d 364 (C.A. 5)). Following the same view are *United States* v. *Sousa*, 158 F. Supp. 508, and *United States* v. *Miller*, 158 F. Supp. 261, arising in the Southern District of New York, where the court said (158 F. Supp. at 509, 263):

> When a statement has been made in defendant's behalf by competent counsel and the defendant does not indicate that he would like to add to the statement already made, he cannot later contend that he was not afforded an opportunity to make such a statement.

See also *Stidham* v. *Swope*, 82 F. Supp. 931 (N.D. Cal.).

In *Couch* v. *United States*, 235 F. 2d 519 (C.A.D.C.), the Court of Appeals for the District of Columbia Circuit ruled under its supervisory power that the procedure of asking the defendant personally if he has anything to say should obtain prospectively, as the better practice under the Rule.[4] Even in that decision the court did not make a clear pronouncement that the language of the Rule *requires* such a procedure. The separate opinion of four judges, urging that the language of the Rule imposes a mandate upon the sentencing

[4] See, also, *Gadsen* v. *United States*, 223 F. 2d 627 (C.A.D.C., 1955), where the court, in vacating sentences because counsel was not present in open court for sentencing, stated that the sentencing court had an affirmative duty to ask the accused whether he desired to make a statement. The same court, the following year, in *Hudson* v. *United States*, 229 F. 2d 36 (C.A.D.C., 1956), held that all reasonable requirements of law were met when both counsel and the defendant were present

court to address the defendant personally (yet not dissenting from the holding that the operation of the new procedure was to be prospective only), relies upon what (for the reasons set forth *supra*) we think to be the erroneous position that the history of the Rule requires such a construction. (See, also, the opinion of two judges, concurring in affirmance of the sentence but dissenting from the adoption of the new procedure on the ground that the language of the Rule negates such a construction.) While it might be the better practice, as the District of Columbia Circuit has held, to receive assurance from the defendant that he does not wish to be heard further, there are many instances like the present one where such an inquiry would appear to be an idle gesture. See also the recent opinion of the Court of Appeals for the Ninth Circuit in *Taylor* v. *United States*, No. 16726 (decided December 12, 1960) (sitting *en banc*), in which the majority of the court held that the defendant's right under Rule 32(a) may be waived by counsel, while four judges felt that the right is personal and not waivable by counsel.

4. The present case.

In the instant case, the record shows that the court went to great lengths to afford petitioner every opportunity to be heard before sentencing. The court

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and stood before the bench, and counsel made a brief plea for clemency. And the year thereafter, in 1957, the same court, in remanding a case for a hearing on an allegation of ineffective assistance of counsel, held "moreover" that the defendant must be resentenced because, since counsel did not speak at sentencing, no one was afforded an opportunity to make a statement in defendant's behalf, citing *Gadsen. Jenkins* v. *United States*, 249 F. 2d 105.

refused to impose sentence immediately after verdict even though counsel, invited to speak at that time, indicated that petitioner was then ready for sentence. The judge postponed sentencing in order that probation reports could be completed and studied, and so that he could give some thought to matters of law raised by petitioner in his motion in arrest of judgment. On the date reset for sentencing, the court heard petitioner's counsel in a legal argument on this motion in arrest of judgment, as well as in an argument attacking the weight and sufficiency of the evidence (on petitioner's motion for a new trial). See the Statement, *supra*, pp. 11–12. Before sentencing, the court specifically addressed counsel: "Did you want to say something?" Counsel spoke then of petitioner's family—his wife and two minor children—whom petitioner had supported except for such time as he had been incapacitated. Counsel also alluded to petitioner's age; he reasoned that, because petitioner would be incarcerated for a long time on sentences he was then serving or might face for other crimes, there was no occasion for the imposition of a heavy sentence in this case. Neither counsel nor the defendant, who was no stranger to court proceedings, indicated that either one had anything further to add. Certainly, petitioner and his counsel were afforded full opportunity to speak on behalf of petitioner, and to present any information in mitigation of punishment.

Some seven years later, petitioner for the first time claimed, in a motion brought under Rule 35, that he was not personally invited to make a statement in his

own behalf or to speak in mitigation of punishment.' He has never alleged, and does not now allege, that he wanted to say anything in person, or what, if anything, he might have added to what counsel had already said, or how it would or might have affected the sentence which was imposed. He relies, *simpliciter,* on what he conceives to be the mandatory nature of the requirement he invokes.

In these circumstances, even if there were not full literal compliance with the Rule (which we do not concede), we submit that its spirit was fully met. Petitioner has shown no prejudice and no real reason for the resentencing he seeks. As Judge Dawson aptly observed in *United States* v. *Miller, supra,* 158 F. Supp. 261, 264: "Essentially the defendant seeks to exalt formalism above substantial justice."

B. EVEN ASSUMING THAT THERE HAD BEEN AN ERROR WITH RESPECT TO RULE 32(a), THE ERROR WOULD NOT HAVE RENDERED THE SENTENCE SUBJECT TO COLLATERAL ATTACK

For the reasons set forth above (*supra,* pp. 18–32), we think that, in the circumstances of this case, if there had been error in the failure of the trial judge to ask petitioner if he had anything to say, the error would have been deemed harmless under Rule 52, F.R. Crim. P., even if it had been raised on direct appeal. *A fortiori,* it does not furnish a basis for collateral attack, whether under Rule 35 or under 28 U.S.C. 2255.

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[7] Petitioner's appeal from his conviction was dismissed for want of diligent prosecution, and he brought two earlier motions to vacate judgment, both appealed. See *Green* v. *United States,* 238 F. 2d 400 (C.A. 1); *Green* v. *United States,* 256 F. 2d 483 (C.A. 1), certiorari denied, 358 U.S. 854. See *supra,* pp. 5–6.

As we discuss in Point III, *infra*, pp. 40–43, the remedy under Rule 35 to correct an illegal sentence is a narrow one—to bring an illegal sentence, which the judgment did not authorize, into conformity with the law. Petitioner's sentence was within the power of the court to impose and was within the maximum permitted by the statute. The error which he urges was at most a minor defect in procedure at the time of sentencing. This is not the kind of illegality to which Rule 35 refers when it says that an "illegal sentence" may be corrected *at any time*. There may have been error, but the sentence was not "illegal."

Neither does petitioner's application lie under the broader remedy by way of collateral attack available under 28 U.S.C. 2255, as a substitute for habeas corpus. See *Mixon* v. *United States*, 214 F. 2d 364 (C.A. 5). The scope of collateral attack was delineated by this Court in *Sunal* v. *Large*, 332 U.S. 174, and does not require much elaboration in relation to the present problem. Only under very unusual circumstances are procedural trial errors, correctible on appeal, a basis for collateral attack. Here, if there was error at all, it was error which went to fundamentals in such a minor way that it is doubtful that it would have been reversible on appeal. It does not begin to approach, in its potential effect, the seriousness of the incorrect trial ruling in *Sunal* v. *Large* that a defendant could not offer a defense which, under subsequent decisions, should have been available to him. Even that kind of error was deemed correctible only by direct appeal, and not on collateral attack. The error here, therefore, was, at most, a point which

could have been raised on direct appeal," and which therefore does not furnish a basis for collateral attack in any form."

II

THE TWENTY-FIVE-YEAR SENTENCE FOR THE AGGRAVATED FORM OF BANK ROBBERY WAS PROPERLY ALLOWED TO STAND

In his second motion under Rule 35 now before the Court (No. 179), petitioner argues that, when the trial court imposed a 20-year sentence for entry into the bank to rob, it exhausted its power to sentence, and therefore that his 25-year sentence, for the aggravated form of the offense, should not be allowed to stand. This position has no support in principle or in the reported decisions. The total offense of which petitioner was found guilty was one having two elements—robbing a bank and putting life in jeopardy. The only sentence which embraces those two elements is the 25-year sentence for the aggravated form of the crime. That is the valid sentence for the total offense

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[a] The holding by the District of Columbia Circuit in *Couch*, *supra*—that, even though the rule espoused by petitioner here should be applied in future trials, failure to follow that practice in the past would not be ground for overturning the sentence or conviction—shows, we believe, that that circuit does not regard the error, if there be one, as of the type which is so basic that it can always be raised collaterally.

[b] If the Court should hold adversely to the government on the issue under Rule 32(a), the result would be not to invalidate the judgment, but merely to have petitioner brought before the district court for resentencing. Since the error occurred after verdict and in no sense affects the verdict, the only relief to which petitioner would be entitled would be resentencing. See *In re Bonner*, 151 U.S. 242.

which the jury found that petitioner committed, and it is the sentence which accurately reflects the intent of the trial judge.

A. THE TWENTY-FIVE-YEAR SENTENCE FOR THE AGGRAVATED FORM OF THE OFFENSE IS THE ONLY ONE WHICH COVERS THE TOTAL OFFENSE WHICH THE JURY FOUND PETITIONER HAD COMMITTED

It has been settled since this Court's decision in *Holiday* v. *Johnston*, 313 U.S. 342, that the provision authorizing a twenty-five-year sentence where life is put in jeopardy during the course of a bank robbery does not define an offense separate from the bank robbery; it merely authorizes increased punishment where an additional fact, putting life in jeopardy, is shown to have occurred during the robbery. Hence, whether those two aspects are charged in one count or in two, a jury must find the two elements of (1) the robbery (or entry with intent to commit a robbery) and (2) the putting of life in jeopardy. A twenty-five-year sentence is authorized only if the verdict reflects both of those elements. The only verdict here which reflects the total offense, embracing these two factors, is the verdict on Count 3 for the aggravated form of the offense.

This is not a situation in which two counts charged alternative ways of committing the same offense, as in other instances where this Court has held that consecutive sentences cannot be imposed. For example, under the decision of this Court in *Prince* v. *United States*, 352 U.S. 322, 329, holding that Congress did not intend to impose separate punishment for entering a bank with intent to commit a felony and for the com-

pleted robbery (or theft), either a charge of entry or a charge of theft will support a judgment. But here we are not confronted with alternatives. Neither entry into the bank nor the completed robbery is an alternative form of the offense of aggravated robbery; both supply merely one element of the aggravated form. The other element of the aggravated offense—putting life in jeopardy—must also be found by the jury before a twenty-five-year sentence can be imposed. Thus, as we have said, the only count which reflects the total offense in this case is Count 3.

The situation here is the same as if the court had actually said, in sentencing on Count 3: "I think you should be punished 20 years for the robbery and an additional 5 years for putting life in jeopardy." This is, in actuality, what the court did. The judge was quite aware that the third count did not charge a separate offense; in his charge to the jury he said (R. No. 179, p. 9):

> The third count is a different type of count. That is not a separate offense. I will speak to you later of the manner in which you will handle the third count. That is not a separate offense. What the Government charges in that count, count 3, is they committed the robbery, the offense charged in count 2, in an aggravated manner. That is, they assaulted and put in jeopardy lives of certain persons by the use of a dangerous weapon. That is not a separate count, to repeat, that is an aggravation of the second count, robbing the bank.

In sum, while it would have been more technically accurate to sentence only on Count 3, rather than

imposing concurrent sentences on the other counts, it is clear that the trial judge did not and could not have exhausted his sentencing power when he imposed sentences on the first two counts, since those counts did not charge the whole offense which the jury found to have been committed by petitioner.[10]

In none of the cases that have arisen since *Holiday* v. *Johnston*, 313 U.S. 342, has the power to sentence for the aggravated form of the offense been deemed curtailed by the fact that a sentence—concurrent or not—has previously been imposed for the unaggravated form. *E.g.*, *Hewitt* v. *United States*, 110 F. 2d 1 (C.A. 8), certiorari denied, 310 U.S. 641; *O'Keith* v. *United States*, 158 F. 2d 591 (C.A. 5); *Remine* v. *United States*, 161 F. 2d 1020 (C.A. 6), certiorari denied, 331 U.S. 862; *United States* v. *Di Canio*, 245 F. 2d 713 (C.A. 2), certiorari denied, 355 U.S. 874; *Lowe* v. *United States*, 257 F. 2d 409 (C.A. 6). The theory of exhaustion of power through imposition of a sentence for the non-aggravated form has been rejected by practically every court of appeals in which it has been urged. See, in addition to the decision

[10] Since the sentences on the first two counts run concurrently with the third, the court below found it unnecessary, at this late date, to order them vacated. Vacation of the concurrent sentences affects neither good time allowances nor eligibility for parole. *Clark* v. *United States*, 267 F. 2d 99 (C.A. 4); 18 U.S.C. 4202. Multiplicity of crimes is a factor which a parole board may and probably does consider in determining whether parole is justified, but parole officers with extensive knowledge in this field know the difference between sentences on concurrent counts relating to one robbery and counts relating to separate transactions.

below, *Duboice* v. *United States*, 195 F. 2d 371 (C.A. 8); *Gebhart* v. *United States*, 163 F. 2d 962 (C.A. 8); *Gebhart* v. *Hunter*, 184 F. 2d 644 (C.A. 10); *Larson* v. *United States*, 172 F. 2d 386 (C.A. 6); see also *Stevenson* v. *Johnston*, 72 F. Supp. 627 (N.D. Cal.), affirmed, 163 F. 2d 750 (C.A. 9), certiorari denied, 333 U.S. 832."

B. SINCE THE TWENTY-FIVE-YEAR SENTENCE REFLECTS THE JUDGMENT OF THE TRIAL COURT AS TO THE PROPER PUNISHMENT FOR THE TOTAL OFFENSE, IT SHOULD BE ALLOWED TO STAND

The twenty-five-year sentence should be allowed to stand because it obviously represents the intent of the trial judge as to the merited punishment for the total crime which the jury found that petitioner had committed, regardless of which count came first or second. As explained above (*supra*, p. 36), that intent is explicit since the judge recognized and told the jury that the third count represented merely an aggravated form of the offense. When a judge imposes

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[11] *Holbrook* v. *Hunter*, 149 F. 2d 230 (C.A. 10), relied upon by petitioner, does not support his theory. In that case, while the twenty-year sentence on a first count was upheld as against a five-year sentence on a second count, both counts contained language alleging (in effect) an aggravated offense. The court did note (p. 232) that "the most that can be said is that when the court imposed the sentence of 20 years on count one, it exhausted its power to sentence," but this was later explained by the Tenth Circuit as being limited to a situation where both counts charge facts bringing them within the purview of the aggravated offense. *Gebhart* v. *Hunter*, 184 F. 2d 644 (C.A. 10). See, also, *Miller* v. *United States*, 147 F. 2d 372 (C.A. 2), where the theory of exhaustion is alluded to without comment or authority, and *United States* v. *Harris*, 97 F. Supp. 154 (D. Mo.), containing dictum in support of the theory.

concurrent sentences on separate counts arising out of a closely related transaction (whether technically one offense or two), he is sentencing on the total transaction. It may be a matter of pure accident on which count sentence is first pronounced. Whichever comes first, the intent to impose the longer sentence for the total offense is clear.

The primary responsibility for sentencing in our system of criminal law rests with the trial judge. The sentence which best represents his judgment as to proper punishment is the sentence which should be allowed to stand. Accordingly, reviewing courts have recognized the need to give effect to the obvious intention of the trial judge, even though on strict technical reasoning the lesser sentence has been imposed on what might seem to be the greater offense. Thus, where a longer sentence has been imposed for the robbery rather than for the aggravated form of the offense, the sentence for the aggravated form has been vacated. *Holbrook* v. *United States*, 136 F. 2d 649 (C.A. 8); *Coy* v. *United States*, 156 F. 2d 293 (C.A. 6), certiorari denied, 328 U.S. 841. Where a defendant has been given a longer sentence on a count charging entry (subject to a maximum of 20 years) than on another count charging a completed larceny (subject to a 10-year sentence), the courts have allowed the longer sentence for entry to stand. *Purdom* v. *United States*, 249 F. 2d 822, 826 (C.A. 10), certiorari denied, 355 U.S. 913; *United States* v. *Williamson*, 255 F. 2d 512 (C.A. 5), certiorari denied, 358 U.S. 941; *United States* v. *Leather*, 271 F. 2d 80 (C.A. 7), certiorari denied, 363 U.S. 831; *Audett* v.

United States, 265 F. 2d 837 (C.A. 9), certiorari denied, 361 U.S. 815. Justice and reason dictate that the manifest intention of the trial judge should control as to which of two or more sentences, contemporaneously imposed, shall be eliminated in order not to subject the defendant to the possibility of double punishment. As this Court said in *Bozza* v. *United States*, 330 U.S. 160, 166–167, "The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner."

III

PETITIONER MAY NOT RAISE IN THIS PROCEEDING THE QUESTION OF THE INSTRUCTIONS TO THE JURY ON THE AGGRAVATED FORM OF BANK ROBBERY

Petitioner urges, finally, in his second motion pursuant to Rule 35 (No. 179), that the trial court (1) failed to instruct the jury that, in order to convict of aggravated robbery on Count 3, it must find that the defendants put the lives of persons in "danger" of harm from the use of a dangerous weapon, (2) incorrectly instructed that the jury need only find under this count that lives were put in "fear," and (3) incorrectly instructed that the jury need not deliberate as to Count 3. Realizing that alleged error in instructions is not a basis for collateral attack, petitioner does not in terms argue that the instructions were erroneous or challenge the validity of the conviction on Count 3 (Pet. Br. 35). He does, however, attempt to do so indirectly by arguing that the aggravated offense was not defined for the jury, and there-

fore that the conviction on Count 3 must have been one for simple robbery, subject to a maximum of 20 years. Apart from the fact that his contentions as to the instructions are lacking in merit, we submit that his complaint still remains one that cannot be raised in a collateral proceeding.

A. THE ALLEGEDLY ERRONEOUS INSTRUCTIONS DO NOT RENDER THE SENTENCE ILLEGAL WITHIN THE MEANING OF RULE 35

The relief prescribed by the first part of Rule 35 is available only to correct an *illegal* sentence. *Heflin* v. *United States*, 358 U.S. 415; *Cuckovich* v. *United States*, 170 F. 2d 89 (C.A. 6), denied certiorari, 336 U.S. 905. Sentences subject to correction under the Rule include those which the judgment of conviction did not authorize (*United States* v. *Morgan*, 346 U.S. 502; *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2)), and others in which there is need for bringing an improper *sentence* into conformity with the law. *Cook* v. *United States*, 171 F. 2d 567 (C.A. 1), certiorari denied, 336 U.S. 926; *Duggins* v. *United States*, 240 F. 2d 479 (C.A. 6); *Fooshee* v. *United States*, 203 F. 2d 247 (C.A. 5).

The illegal sentence referred to in Rule 35 is one in which the illegality can be shown from the common law record, *i.e.*, the common law judgment roll (mainly the indictment, the plea, the verdict, and the sentence). See *McIntosh* v. *Pescor*, 175 F. 2d 95 (C.A. 6).[12] The Advisory Committee Notes show

[12] See, also, *United States* v. *Bradford*, 194 F. 2d 197 (C.A. 2); *United States* v. *Zisblatt*, 172 F. 2d 740 (C.A. 2).

that, in providing that the court may correct an illegal sentence *"at any time"*, the Rule continued existing law; and the then existing law as to illegal sentences stemmed from the common law. What was an illegal sentence at common law is discussed in *United States* v. *Mayer*, 235 U.S. 55, in explaining the exceptions to the common law doctrine that a court could not set aside or alter its judgment after the expiration of the term at which it was entered. The Court said (235 U.S. at 68):

> * * * In criminal cases * * * error would lie in the King's Bench whether the error was in fact or law. Tidd, 1137; 3 Bac. Abr. (Bouv. ed.) "Error" 366; Chitty, Crim. L. 156, 749. See *United States* v. *Plumer*, 3 Cliff. 28, 59, 60. The errors of law which were thus subject to examination were only those disclosed by the record, and as the record was so drawn up that it did not show errors in the reception or rejection of evidence, or *misdirections by the judge*, the remedy applied "only to that very small number of legal questions" which concerned "the regularity of the proceedings themselves." See Report, Royal Commission on Criminal Code (1879), p. 37; 1 Stephen, Hist. Crim. L. 309, 310. [Emphasis added.] [13]

It is thus clear that instructions are not part of the common law record.

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[13] *Mayer* held that error involving the bias of a juror could not be heard in a federal court by motion after the expiration of the term in which judgment was entered. The Court held the remedy, if any, was by writ of error or motion for a new trial.

It follows that claimed error as to instructions cannot bring a case within the scope of this narrow remedy under Rule 35, no matter how the asserted error is rephrased. In *Sunal* v. *Large*, 332 U.S. 174, 182, the Court ruled that error in a legal ruling on the availability of a defense could not be magnified to constitutional proportions by claiming that it deprived a defendant of the opportunity to defend himself. And as was said in *United States* v. *Bradford*, *supra*, 194 F. 2d at 201:

> Obviously it is an utterly untenable argument, as Magruder, J. said in *Cook* v. *United States*, *supra*, that, although the judgment has become unassailable [on direct appeal], the sentence may be "corrected" as "illegal" because of some error which vitiates the judgment.

For the purposes of Rule 35, the common law record in the instant case would show that petitioner was indicted under Count 3 for aggravated robbery; that the jury returned a verdict of guilty on Count 3; and that the sentence imposed was within the maximum provided by Congress for aggravated robbery. On the face of this record, therefore, petitioner's assumption that the jury returned a valid verdict on Count 3 for the simple offense of robbery cannot be accepted. His assertion that the verdict on Count 3 was entered in response to the court's charge would necessarily call for a review of those instructions. But since instructions are not a part of the record for the purposes of a motion under Rule 35, he may not use this procedure to obtain his desired end.

B. PETITIONER'S CHALLENGE TO THE INSTRUCTIONS IS NOT OTHERWISE A BASIS FOR COLLATERAL ATTACK

A proceeding under 28 U.S.C. 2255 has broader scope than one under Rule 35, but, even so, petitioner's attack on the instruction does not furnish a basis for invoking that remedy.

Instructions, if incorrect, constitute trial error, correctible on appeal and not collaterally. *Sunal* v. *Large*, 332 U.S. 174. Petitioner did not pursue his appeal which was dismissed "for want of diligent prosecution." This is not one of those classes of problems where, because of constitutional or jurisdictional involvements, collateral relief may be available "without consideration of the adequacy of relief by the appellate route". See *Sunal* v. *Large*, supra, 332 U.S. at 178. This is likewise not a situation where the facts relied upon were *dehors* the trial record and therefore not open to consideration and review on appeal. See *Waley* v. *Johnston*, 316 U.S. 101, 104. This is a simple case for direct review—the right to which petitioner has by his own inaction waived. Judicial opinion is unanimous that an attack on instructions cannot be presented by motion under 28 U.S.C. 2255. *United States* v. *Stevens*, 260 F. 2d 549 (C.A. 3); *Banks* v. *United States*, 258 F. 2d 318 (C.A. 9), certiorari denied, 358 U.S. 886; *Olson* v. *United States*, 234 F. 2d 956 (C.A. 4); *Adams* v. *United States*, 222 F. 2d 45 (C.A.D.C.); *Lopez* v. *United States*, 217 F.

2d 526 (C.A. 9); *United States v. Jonikas*, 197 F. 2d 675 (C.A. 7), certiorari denied, 344 U.S. 877.[14]

C. SINCE PETITIONER'S ALLEGATION OF ERRONEOUS INSTRUCTIONS LACKS MERIT, HE IS ENTITLED TO NO RELIEF IN ANY EVENT

Finally, petitioner's contentions that the court failed to charge as to the aggravated offense are lacking in merit and would not have provided grounds for relief even had they been urged as errors upon direct appeal.[15] The court's instruction did not take from the jury the duty of deliberating as to petitioner's guilt of the aggravated offense. The jury was told specifically that it must find guilt or innocence with respect to each count. See p. 10, *supra*. What the court did explain was that, since petitioner did not deny that a robbery had in fact taken place during which lives had in fact been placed in jeopardy (but only that he himself did not commit it), the facts developed relative thereto could be "put to one side". This was just another way of saying that these facts were not contested (as other important facts in the case were not contested). *Supra*, pp. 9–10. The jury could not have been misled into believing that this settled the matter; the last instruction given was

[14] In *Shelton* v. *United States*, 235 F. 2d 951 (C.A. 4), relied upon by petitioner, it could not be told whether the verdict, as announced by the foreman of the jury, followed the charges in the indictment or the charges as differently described in the trial court's instructions. The confusion was traceable to an error in those instructions. The court of appeals held, in view of the "extraordinary circumstances", that the intention of the jury as to the *verdict* was unclear.

[15] Petitioner made no objections at the trial to the alleged errors in instructions of which he now complains. See *Wong Tai* v. *United States*, 273 U.S. 77.

that guilt or innocence must be decided as to Count 1, Count 2, and Count 3.

For the same reason, the jury could not have been misled by what was an apparent slip of the tongue on the part of the court in repeating the issue under Count 3 as "did they rob the bank in aggravated circumstances, put in *fear* the life of a person by the use of a pistol?" (emphasis added) (see *supra*, p. 9). The jury had already been adequately instructed as to aggravated robbery; it had been told specifically that jeopardy meant *danger* (*supra*, pp. 8–9).[16] The error, if any, in the subsequent use of the word "fear" instead of "danger" would have been harmless in view of this earlier instruction and of the fact that it was never questioned that lives were put in danger and that a pistol was used—the only issue being whether petitioner was the robber who did so. These alleged errors could not have affected the result or in any way prejudicially affected petitioner. They would not afford a basis for reversal on direct appeal. See *Kotteakos* v. *United States*, 328 U.S. 750. They cannot now afford a basis for correcting or vacating the sentence. *Chadwick* v. *United States*, 170 F. 2d 986 (C.A. 5).

[16] Even in the later formulation using "fear" instead of "danger", the judge referred to "the use of a pistol"—a weapon universally regarded as not only evoking "fear" but as creating "danger." This was not a case in which the instrument used to commit the robbery might have evoked fear without also creating an objective danger.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the courts below, affirming the orders of the district court denying petitioner's motions to correct sentence, should be affirmed.

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DECEMBER 1960.

PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

NO. 70

THEODORE GREEN,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR REHEARING OR REMAND

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

NO. 70

THEODORE GREEN,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR REHEARING OR REMAND

The judgment of the Court of Appeals in this case was affirmed by this Court on February 27, 1961. For the reasons set forth below, the petitioner respectfully urges that this case should either be set down for rehearing or remanded to the District Court.

1. The basis for MR. JUSTICE FRANKFURTER's opinion that the petitioner's sentence was not illegal was that the petitioner had "failed to meet his burden of showing that he was not accorded the personal right which Rule 32(a) guarantees". This conclusion was reached notwithstanding that both lower courts and counsel for both sides at every stage of this case proceeded on the basis that the trial judge did *not* invite the petitioner to speak before sentencing.*

But even assuming there were a sound basis for the quoted statement in MR. JUSTICE FRANKFURTER's opinion, it is perfectly clear that there was no possible way the defendant could have sustained the "burden" which MR. JUSTICE FRANKFURTER's opinion imposes on him. The District Court held no hearing on the petitioner's original motion in this case and thus denied the petitioner an opportunity to present any evidence to show that he had not been invited to speak. This was not a result of any failure or omission on the petitioner's part. It resulted solely from the lower court's interpretation of Rule 32(a) as not requiring such an invitation—an interpretation now reversed by eight Justices of this Court.

Other defendants in the petitioner's position will have an opportunity to establish whether they have been accorded the right to speak required by Rule 32(a), just as the petitioner himself would have had that opportunity but for the District Court's error of law. Reason and justice require that the petitioner now be afforded this opportunity.

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*Not only was this concession made twice in the Government's brief in this Court, it was also made in its brief in the Court of Appeals by the U. S. Attorney's office which had represented the Government at the sentencing hearing itself. See P. 9 of Government's Brief in U. S. Court of Appeals:

> "It is clear from an examination of the record in this case that there is no indication that the court at the time of sentencing asked this appellant if he desired to make a statement in person after the court had heard at length from competent counsel."

Accordingly, it is respectfully urged that this case should at the very least be remanded to the District Court for a determination on whether the trial judge invited the petitioner to address the court before sentencing.

2. Under MR. JUSTICE STEWART's view of Rule 32(a) there was no need for him to pass upon the interpretation of the record which divides the rest of the Court. But the other two opinions of the Court settle the construction of Rule 32(a) in such a way as to make the interpretation of the record critical. Fairness demands that all nine Justices who sat on this case pass on this critical issue. It is therefore respectfully urged that MR. JUSTICE STEWART should make a determination on one side of the question or the other, since his failure to do so deprives the petitioner of a decision by the full Court on the issue on the basis of which his case is decided. *Cf. Ladner v. United States*, 355 U. S. 282 (affirmed by equally divided Court); rehearing granted, 356 U. S. 969; reversed and remanded 358 U. S. 169.

For the reasons stated, it is respectfully requested that this Court's mandate be amended to direct remand of the case to the trial court for consideration of the question whether the requirement of Fed. R. Crim. P. Rule 32(a), as construed by this Court, has been satisfied in this case; or alternatively that this Court set down the case for rehearing on this issue in order that it may be decided by the whole Court.

Respectfully submitted,

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March 1961

SUPREME COURT OF THE UNITED STATES

Nos. 70 AND 179.—OCTOBER TERM, 1960.

Theodore Green, Petitioner, v. United States. | On Writs of Certiorari to the United States Court of Appeals for the First Circuit.

[February 27, 1961.]

MR. JUSTICE FRANKFURTER announced the judgment of the Court in an opinion in which MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join.

Defendant, the petitioner here, in 1952 was convicted in the United States District Court for Massachusetts on a three-count indictment charging him with (1) entering a bank with intent to commit a felony, in violation of 18 U. S. C. § 2113 (a); (2) robbing the bank, also in violation of 18 U. S. C. § 2113 (a); and (3) assaulting or putting in jeopardy the lives of persons by use of a dangerous weapon while committing the robbery, in violation of 18 U. S. C. § 2113 (d). Five days later, after defendant's counsel had completed motions in arrest of judgment and for new trial, the district judge asked, "Did you want to say something?", whereupon counsel at some length invoked the trial judge's discretionary leniency. The defendant's age, family status, and physical condition were mentioned, as was the fact that he was then serving a sentence in a state penitentiary which would delay the time from which his federal punishment would run. Thereupon the trial judge, presumably relying upon a presentence probation report, observed that the defendant was a hardened criminal, that he had in the past committed other armed robberies, and that there was no warrant to believe that rehabilitation was possible. He then pronounced sentence as follows:

> "Theodore Green, the Court orders that on this indictment you be sentenced as follows: On Count 1

of the indictment 20 years, on Count 2 of the indictment that you be imprisoned for 20 years, and on Count 3 of the indictment that you be imprisoned for the period of 25 years, said prison sentence to run concurrent and to begin upon your release from prison upon the sentence you are now receiving under order of the State Court."

Subsequently, defendant was permitted to bring his appeal *in forma pauperis* which was dismissed by the Court of Appeals "for want of diligent prosecution." In two other later actions, defendant unsuccessfully brought proceedings under 28 U. S. C. § 2255 to vacate his sentence.

These two cases, here consolidated, arise out of two separate actions brought some seven years after conviction, under Rule 35 of the Federal Rules of Criminal Procedure in an effort to set aside the sentence which petitioner asserts to be illegal. In No. 70, petitioner claims that the failure of the judge to inquire of the defendant if he had anything to say on his own behalf prior to sentencing rendered the subsequent sentence illegal under Federal Criminal Rule 32 (a).[1] In No. 179 petitioner questions the legality of the twenty-five-year sentence for aggravated bank robbery[2] when immediately prior to its imposition the judge had imposed a twenty-year sentence under another count of the indictment for the same offense without the elements of aggravation.

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[1] Rule 32 (a) in pertinent part provides:

"Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

[2] "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both." 18 U. S. C. § 2113 (d).

If Rule 32 (a) constitutes an inflexible requirement that the trial judge specifically address the defendant, *e. g.*, "Do you, the defendant, Theodore Green, have anything to say before I pass sentence," then what transpired in the present case falls short of the requirement, even assuming that this inadequacy in the circumstances now before us would constitute an error *per se* rendering the sentence illegal.

The design of Rule 32 (a) did not begin with its promulgation; its legal provenance was the common-law right of allocution. As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal. *See* Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K. B.). Taken in the context of its history, there can be little doubt that the drafters of Rule 32 (a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century—the sharp decrease in the number of crimes which were punishable by death, the right of defendant to testify on his own behalf, and the right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself. We are buttressed in this conclusion by the fact that the Rule explicitly affords the defendant two rights: "to make a statement in his own behalf," and "to present any information in mitigation of punishment." We therefore reject the Government's contention that merely affording defendant's counsel the

opportunity to speak fulfills the dual role of Rule 32 (a). See *Taylor* v. *United States*, Doc. No. 16,726, Dec. 12, 1960 (9th Cir.).

However, we do not read the record before us to have denied the defendant the opportunity to which Rule 32 (a) entitled him. The single pertinent sentence—the trial judge's question "Did you want to say something?"—may well have been directed to the defendant and not to his counsel. A record, certainly this record, unlike a play is unaccompanied with stage directions which may tell the significant cast of the eye or the nod of the head. It may well be that the defendant himself was recognized and sufficiently apprised of his right to speak and chose to exercise this right through his counsel. Especially is this conclusion warranted by the fact that the defendant has raised this claim seven years after the occurrence. The defendant has failed to meet his burden of showing that he was not accorded the personal right which Rule 32 (a) guarantees, and we therefore find that his sentence was not illegal.

However, to avoid litigation arising out of ambiguous records in order to determine whether the trial judge did address himself to the defendant personally, we think that the problem should be, as it readily can be, taken out of the realm of controversy. This is easily accomplished. Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.

In No. 179 petitioner contends that his sentence was rendered illegal because the district judge, after sentencing him to twenty years for bank robbery under Count 2, proceeded under Count 3 to sentence him to twenty-five years for the aggravated version of the same crime. The

claim is that since the two counts did not charge separate offenses, the judge's power to sentence expired with the imposition of sentence under Count 2 and that five years should be remitted from petitioner's concurrent sentence.

The Government concedes that Count 3 did not charge a separate offense, see *Holiday* v. *Johnston*, 313 U. S. 342, 349, and there is every indication that the district judge was of this view. In his charge to the jury he stated:

> "The third count is a different type of count. That is not a separate offense. I will speak to you later of the manner in which you will handle the third count. That is not a separate offense . . . . That is not a separate count, to repeat, that is an aggravation of the second count, robbing the bank."

Although petitioner is technically correct that sentences should not have been imposed on both counts, the remedy which he seeks does not follow. This is not a case where sentence was passed on two counts stating alternative means of committing one offense; rather, the third count involved additional characteristics which made the offense an aggravated one—namely, putting persons in jeopardy of life by use of a dangerous weapon. Plainly enough, the intention of the district judge was to impose the maximum sentence of twenty-five years for aggravated bank robbery, and the formal defect in his procedure should not vitiate his considered judgment.[*]

Affirmed.

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[*] Petitioner further complains of an improper charge to the jury on Count 3. Rule 35 does not encompass all claims that could be made by direct appeal attacking the conviction, but rather is limited to challenges that involve the legality of the sentence itself.

SUPREME COURT OF THE UNITED STATES

Nos. 70 AND 179.—OCTOBER TERM, 1960.

Theodore Green, Petitioner, v. United States.	On Writs of Certiorari to the United States Court of Appeals for the First Circuit.

[February 27, 1961.]

MR. JUSTICE STEWART, concurring.

I join in affirming the judgments. Rule 32 (a) does not seem to me clearly to require a district judge in every case to volunteer to the defendant an opportunity personally to make a statement, when the defendant has a lawyer at his side who speaks fully on his behalf. But I do think the better practice in sentencing is to assure the defendant an express opportunity to speak for himself in addition to anything that his lawyer may have to say. I would apply such a rule prospectively, in the exercise of our supervisory capacity. *See Couch* v. *United States*, 235 F. 2d 519.

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[February 27, 1961.]

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur, dissenting.

I agree that Federal Criminal Rule 32 (a) makes it mandatory for a federal judge before imposing sentence to afford every convicted defendant an opportunity to make, in person and not merely through counsel, a statement in his own behalf presenting any information he wishes in mitigation of punishment and that failure to afford this opportunity to the defendant personally makes a sentence illegal. I agree too that the governing legal question in determining whether such an opportunity has been afforded under Rule 32 (a) is "whether the trial judge did address himself to the defendant personally," since it would be wholly artificial to regard this opportunity as having been afforded in the absence of a specific and personal invitation to speak from the trial judge to the defendant.[1] The very essence of the ancient common-law right called "allocution" which MR. JUSTICE FRANKFURTER recognizes as underlying

[1] "After being convicted, the defendant is usually so crushed as to hesitate to make demands lest they bring increased punishment. The rule [Rule 32 (a)] contemplates no such demand, and clearly, without the necessity of any demand at that stage of the trial, the defendant's legal rights should be accorded to him by the court." *Mixon* v. *United States*, 214 F. 2d 364, 366 (Rives, J., concurring).

Rule 32 (a) has always been the putting of the question to the defendant by the trial judge.[1]

I think the record in this case clearly shows that the defendant was denied this opportunity, that the sentence imposed upon him therefore was illegal and for this reason that the cause should, in accordance with Federal Criminal Rule 35, be sent back to the District Court for resentencing after compliance with Rule 32 (a). MR. JUSTICE FRANKFURTER refuses to take this course, stating that "we do not read the record before us to have denied the defendant the opportunity" to talk to the judge about his sentence. This conclusion apparently rests on the view that the trial judge's single question deemed pertinent to this subject, "'Did you want to say something?'—may well have been directed to the defendant and not to his counsel." The opinion goes on to imply that maybe when the judge asked "you" the question he cast his eye or nodded his head in the defendant's direction, maybe the defendant saw the eye cast or the head nod, and therefore it "may well be that the defendant was sufficiently apprised of his right to speak and chose to exercise this right through his counsel." On this chain of perhaps possible, but purely imaginary happenings, plus the seemingly irrelevant fact that the defendant "raised this claim seven years after its occurrence," it is said that the petitioner "has failed to meet his burden of showing that he was not accorded this personal right which Rule 32 (a) guarantees him, and we therefore find that his sentence was not illegal."

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[1] An extensive and detailed review of the English and American common law and statutory cases on this subject led one author to begin his conclusion with the following sentence: "I say, as always, allocution is an authoritative address by the court to the prisoner as he stands at the bar for sentence." Barrett, Allocution, 9 Mo. L. Rev. 115, 232, at 254.

A careful examination of the record reveals the utter implausibility of these imaginative suggested additions to the transcript. The trial judge's bare question "Did you want to say something?" follows immediately upon a lengthy statement covering three printed pages by the counsel for a codefendant arguing that his motion for a new trial should be granted because of the weakness of the evidence, inconsistencies in testimony, and lack of credibility of a government witness. The colloquy in the four pages preceding that likewise does not touch upon the question of sentencing. Even if it is assumed that the trial judge might have been so thoughtless as to address so unspecific a question to a layman at that point in the proceeding, can it seriously be believed that under such circumstances the defendant would have understood the question to be inviting him to speak on the subject of mitigating factors to be considered in sentencing even if the judge had nodded in his direction when asking "Did you want to say something?" Moreover, the answer "Yes, sir" and the succeeding statement came not from the defendant, but from his counsel (who was not the preceding speaker). The obvious implication is the fact explicitly admitted twice in the Government's brief in this case: that the question was addressed to defendant's counsel and not to defendant himself.[1]

I am forced to conclude that the actual holding in this case makes Rule 32 (a) mean far less for this particular defendant than the Rule is declared to mean, at least for defendants tried in the future. Judges

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[1] "[ ] (R. No. 70, pp. 4–18). Then the court asked *defense counsel* if he wanted to say something. In response, counsel spoke for leniency in sentencing (R. No. 70, pp. 18–19)." Brief for the United States, p. 11. (Emphasis supplied.)

"Before sentencing, the court *specifically addressed counsel*: 'Did you want to say something?'" Brief for the United States, p. 31. (Emphasis supplied.)

are warned that hereafter their records must leave no doubt that a "defendant has been issued a personal solicitation to speak prior to sentencing." This, I think, is the correct meaning of the Rule as it was adopted, and this defendant just like all others should be accorded his right under it. He should not be denied that right either because of his criminal record or because of fears conjured up about the number of prisoners who might raise the same question in the event of a decision in this defendant's favor. Bad men, like good men, are entitled to be tried and sentenced in accordance with law, and when it is shown to us that a person is serving an illegal sentence our obligation is to direct that proper steps be taken to correct the wrong done, without regard to the character of a particular defendant or to the possible effect on others who might also want to challenge the legality of their sentences as they have the right to do "at any time" under Rule 35. If it has any relevance at all, the fact that there may be other prisoners in this country's jails serving illegal sentences would seem to me to make it all the more imperative that we grant appropriate relief in this case rather than search for some obviously dubious excuse to deny this petitioner's claim.

I do not understand why it is necessary or legally correct to defeat this prisoner's claim by invoking what appears to be a wholly new doctrine of burden of proof. What, may I ask, is the burden a defendant must meet to show he was not accorded the personal opportunity to address the judge before a sentence is imposed? Is it proof beyond a reasonable doubt, by a preponderance of the evidence, by the overwhelming weight of the evidence, or what? I suppose from MR. JUSTICE FRANKFURTER'S opinion that it was the duty of this defendant to show under some standard that when the judge said "Did you want to say something?", he neither pointed his finger, cast his eye nor nodded his head in the defendant's direc-

tion, and that it was incumbent upon the defendant to make this proof even though the Government admitted that the question had been addressed to his counsel and not to the defendant himself. It would seem to me, even in the absence of the Government's admission as to the factual occurrence, that since when the question was asked defendant's counsel immediately made a statement, the fair inference is that if there was any "significant cast of the eye or . . . nod of the head," it was directed toward counsel who responded and not toward the defendant who said nothing. Yet it is said that defendant's claim must be defeated because he failed to overcome an inference, without basis in logic or law, of a fact which has been expressly disclaimed by the Government in this case.

The language of MR. JUSTICE FRANKFURTER'S opinion does not jibe with the harsh result reached in refusing to accord to petitioner the benefit of Rule 32 (a). As he points out, that Rule embodies the practice of the English-speaking world for three centuries or more, based as he properly says upon the belief that, "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." A rule so highly prized for so sound a reason for so long a time deserves to be rigorously enforced by this Court, not merely praised in resounding glittering generalities calculated to soften the blow of nonenforcement.

I would remand this case for resentence after compliance with Rule 32 (a).